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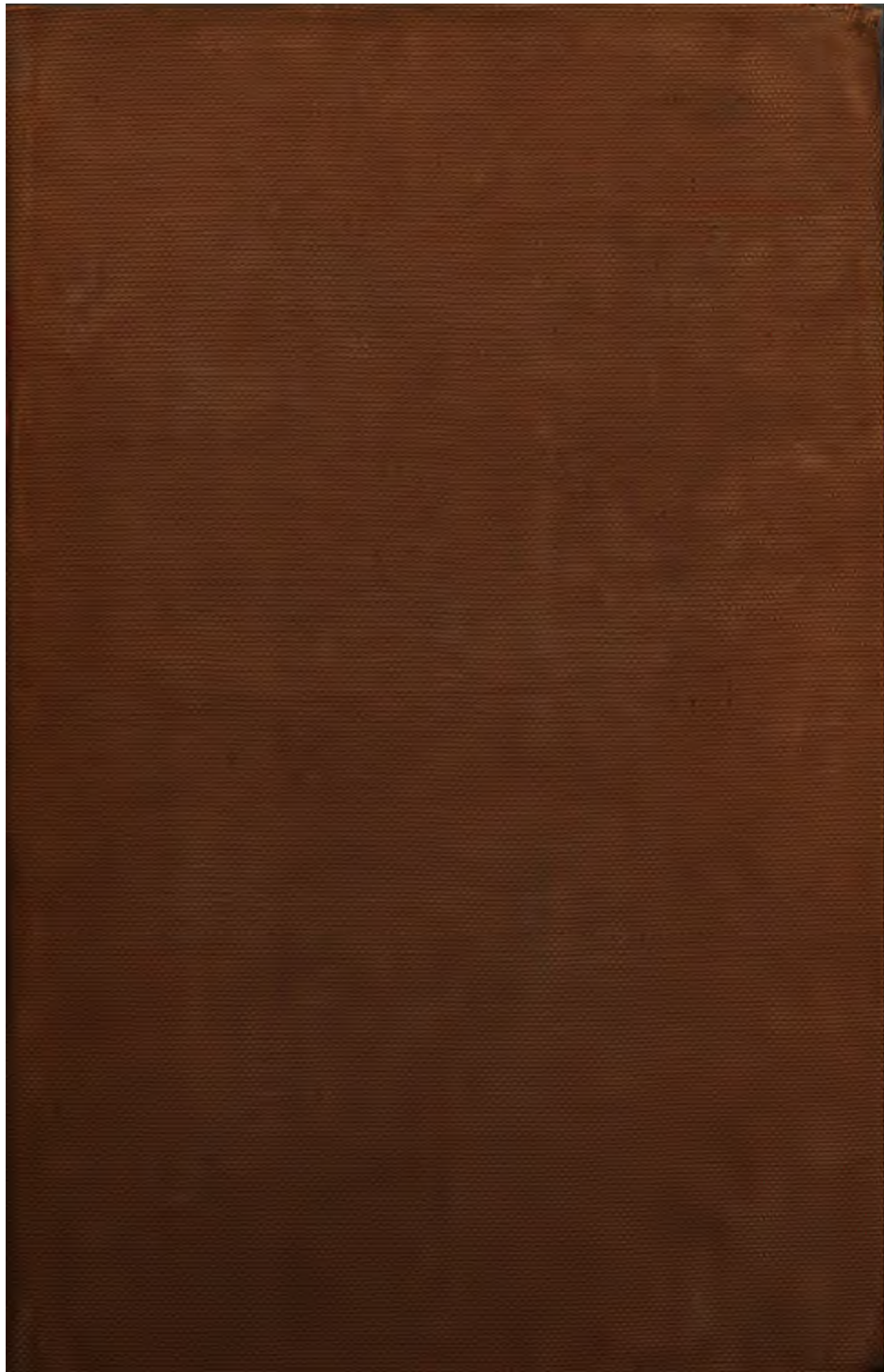
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J. E. Gilchrist

REPORTS
OF
CHANCERY CASES,
DECIDED
IN THE FIRST CIRCUIT
OF THE
STATE OF NEW-YORK,

BY
THE HON. WILLIAM T. McCOUN,
VICE-CHANCELLOR.

BY CHARLES EDWARDS,
COUNSELLOR AT LAW.

VOL. II.

NEW-YORK:
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1837.

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Nathaniel L. Goldstein

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CASES
IN THE
VICE-CHANCELLOR'S COURT.

FIRST CIRCUIT.

WILLIAM T. McCOUN, Esq., Vice Chancellor.

**PHILIPS, Administrator, &c., and others, v. BELDEN,
Executrix of BELDEN, and others.**

As a general rule, where an account is made up and rendered in due form, he to whom it is rendered is bound to examine the same or to procure some one to examine it for him; and if he admits the account to be correct, it becomes a stated account and is binding upon both parties—the balance being the debt which may be sued for and recovered at law upon the basis of an *instituta computassent*. So, if instead of an express admission of the correctness of the account, the party receiving it keeps the same by him and makes no objection within a reasonable time, he will be considered, from his silence, as acquiescing and be equally bound by it as a stated account. If either party attempts to impeach the settlement and to open the accounts for re-examination, either wholly or in part—and which can only be done upon the ground of fraud, mistake or error—the burden of proof rests upon the party impeaching and he must prove the fraud or point out the error or mistake on which he relies.

The cases allowing enquiry into accounts, where there has been a confidential relationship between the parties, do not extend the doctrine to a settled account between principal and land agent where there has been an actual accounting, even although there may have been great confidence and trust.

Equity gives great effect to the lapse of time and discourages claims not promptly made, especially where there has been no personal disability or other impediment.

Where enough appears, in a suit for account, to induce a belief of errors and that accounts require correction, it is the duty of the court to permit it to be done by giving leave to surcharge and falsify.

Parties, in being allowed to surcharge and falsify, will be limited to such matters as they have specifically alleged to be overcharges, errors and omissions.

Distinction between surcharging and falsifying and accounting generally: Where liberty is given to surcharge and falsify, the court takes the account to be a stated and settled account and establishes it as such. If either party can show an omission, for which an entry of debit or credit ought to be made, such party surcharges, i. e. adds to the account, and if any thing should be inserted which is wrong, he is at liberty to show it, and this is a falsification. The *onus probandi* is always on the party making the surcharge

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or falsification ; and if he fails to prove it, the account must stand as correct. But, in a general accounting, the party producing the account must show the items to be correct. O. and P. were owners of a large landed estate divided into farms. Many years ago they appointed T. B. their general agent to manage the estate and its tenantry and to agree with purchasers and to receive all the money and revenue arising from it. This agency continued to 1791, when A. B. (nephew to T. B.) was appointed sub-agent. In 1806, T. B. died ; and A. B. became the general agent. Soon afterwards O. died, but the whole estate descended to P. who continued A. B. as such agent down to 1836. The powers of A. B. as given to him by O. and P. were those of a general agent and steward. O. and P. were in every way competent to scrutinize the accounts of A. B., but still they were averse to the trouble of it and relied entirely upon his integrity and went into no minute examination of them. He received money and acted generally in the agency ; and from time to time shewed accounts, books of entries, vouchers, and copies of receipts given by him and paid balances as stated to the parties and they gave him receipts and acknowledged the accounts to be settled. H_{eld} that this was different from a case of confidential relationship ; and, upon a bill filed by P. in 1839, against A. B. for a general accounting, **DECIDED** the accounts rendered and signed to be stated and settled accounts. But inasmuch as some particular errors and omissions were expressly charged, the court allowed the parties to surcharge and falsify as to these, but no further.

Feb. 23,
1833.

Principal
and Land
Agent.
Settled Ac-
counts.
Attorney and
Client.
Surcharging
and Falsify-
ing.

The original bill in this cause was filed in the month of February, one thousand eight hundred and twenty-nine, by Captain Frederick Philips, in his individual capacity, and as administrator of his mother, Margaret Ogilvie, deceased, (and to whom he was sole heir and next of kin,) against Amos Belden, for an account of his agency of their estates. The bill also sought to set aside a conveyance made by Captain Frederick Philips, and Samuel Gouverneur and Mary his wife to Amos Belden, of a farm on which he resided ; and the complainants claimed payment of large sums of money growing out of his agencies, alleged to be due to the said Frederick Philips at the time the bill was filed, both in his own right and in his character of administrator of Mrs. Ogilvie.

Soon after filing the bill the original complainant died intestate ; and the suit was revived by and in the name of his grandson, Frederick Philips, as his administrator, and who had also become administrator *de bonis non* of Mrs. Ogilvie, as well as in the names of Samuel Gouverneur and Mary, his wife : Mrs. Gouverneur being the daughter, sole heiress and next of kin of Captain Philips.

After the answer had been put in and proofs were closed, the defendant, Amos Belden, died ; and the suit was then revived against the present defendants, who were the widow and children, executors and devisees of Amos Belden.

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The cause was now heard upon pleadings and proofs, which were of very great length.

The following is a succinct history of the agency : Mrs. Ogilvie, and her son Captain Philips, were the owners of a very large landed estate, called Philip's Patent, comprising a large portion of what is now Putnam county. Thomas Belden, the uncle of Amos Belden, had the agency of these lands from a very early period. In the year one thousand seven hundred and ninety one, Mrs. Ogilvie and Captain Philips appointed Amos Belden the sub-agent or assistant to his uncle, who was continued in the agency, and whose powers did not entirely cease until near the period of his death, which took place in the year one thousand eight hundred and six. Amos Belden, at first, resided with his uncle, and acted, in some measure, under his direction ; but, gradually, the whole of the duty devolved upon him. On the fourth day of February one thousand eight hundred and seven, Mrs. Ogilvie died, being then almost eighty years of age ; and upon her demise, the whole estate descended to her son, Captain Philips, who, from this period, was the sole proprietor of the estates, and Amos Belden, his sole agent, down to about the close of the year one thousand eight hundred and twenty-six. The powers of the latter as receiver, both from Mrs. Ogilvie and Captain Philips, were those of a general agent and steward. The patent or manor was divided into farms ; and many of them were occupied by tenants.

Mr. Belden, as agent and steward, collected the rents, made contracts for leases, negotiated sales of some of the lands to settlers, and prepared the leases and conveyances which the proprietors executed, and handed to him to be delivered—leaving it entirely to him to receive the consideration money, (where money was to be paid) or to take notes or bonds and mortgages for security, and to hold the same, and collect the principal and interest monies whenever due. And as he resided upon the patent, and the proprietors lived in New York, the general superintendence and management of the estate and its tenantry, and the agreeing with purchasers, and the receiving of money and the revenue, were confided to him. In this way large amounts of money came

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into his hands during the time of his agency ; and, for these he was to account.

The bill charged, in substance, as regarded Mrs. Ogilvie, that, by agreement, she was to allow him a commission of seven and a half per cent. on all monies he collected. That, from her great confidence in him, the bonds, rent-rolls, notes, &c. to a large amount, belonging to her, which had been in the hands of the uncle, Thomas Belden, her former agent, she permitted to pass into the possession of Amos Belden, without any inventory or statement being made of the same. Also, that no accounts of the estate, showing any disposition of the bonds and notes or of the lands sold or monies collected and disbursed, with vouchers, were ever furnished by him to Mrs. Ogilvie, nor did she ever call for such accounts ; and she never examined even the imperfect statements which he did occasionally furnish—and, from her age, habits of life, and inexperience in accounts, she was incapable of making a proper examination of the same, while her confidence in him was such, as never made her think it necessary. The bill also alleged that a large amount of notes, bonds and money, belonging to Mrs. Ogilvie remained in his hands at the time of her death, in the year one thousand eight hundred and seven ; and no account thereof had since been rendered to Captain Philips, although the same was frequently requested. That Captain Philips was easy and thoughtless in business matters, and, on account of having perfect confidence in this agent, never insisted on a settlement of Mrs. Ogilvie's accounts, until a short time before the filing of the bill, when the agent refused to settle the same, alleging his having made a full settlement with Mrs. Ogilvie, shortly before her death. That the complainant had lately discovered the fact of Mrs. Ogilvie's having, at different times, signed receipts in full, and accounts current for the agent as presented by him, on the credit side of which accounts a gross sum merely was entered, whilst, on the debit side, the charges were in detail, and Mrs. Ogilvie signed the same from a blind confidence, without examining the accounts or books or exhibiting or examining of vouchers, and in ignorance of the effect of the papers so signed. That, in such accounts, there were various overcharges, and,

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amongst them, a demand of five per cent. commission on sales of land, in addition to a general compensation to the agent, which charge was unjust and unauthorized and unknown to Mrs. Ogilvie, and wholly unknown to the complainant until recently. The bill further stated, that the defendant, Amos Belden, never prepared, even upon his own books, any regular statement of the property of Mrs. Ogilvie remaining in his hands at her death, but continued to receive large sums of money from such property, and, in some cases, credited the same to the complainant, without making any distinction in his entries between such monies and those received from the individual estate of the complainant; and had so blended the accounts, that no fair and just settlement of them could be effected, until a similar settlement of his accounts with the complainant individually was made, and, *vice versa*.

The bill then set forth, that the agency of Mr. Belden for Captain Philips was of the same character as the one with Mrs. Ogilvie, and the compensation similar, until the year one thousand eight hundred and eleven, when the commission for his services was reduced to five per cent., in consideration of large sums, which he would thereafter have to receive from the sales of land—under an agreement for an appraisalment of the farms to the tenants as purchasers. That a large amount of bonds, notes and other securities, with rent-rolls, deeds and maps, belonging to the complainant, came into his possession directly from Thomas Belden, the first agent, without passing through the hands of the complainant, and without any inventory or account having been furnished to him; and from the great confidence he had in both, the complainant permitted a transfer without requiring the same. And in addition to these, and during the time he was such agent, large sums of money, and a great number of other bonds, notes and securities belonging to the complainant, came into his hands. That, from the general habits of life of Captain Philips, and his total inexperience in business, and in keeping accounts, his aversions to the same, and on account of his unbounded confidence in the agent, he never took any part in the management of the estate, except in the execution of deeds and papers, and in performing such

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other occasional acts as the agent suggested; and in all which cases, the complainant acted without any examination or knowledge of the subject, further than from information of the agent; and, in general, and throughout all the transactions, he reposed entirely upon the judgment of this agent. The bill then showed various transactions in relation to the estate, and of sales made to a large amount and monies received by the agent; charged the latter with acts of mismanagement and remissness of duty, whereby losses had been sustained; and impeached the fairness of his conduct and motives in becoming the purchaser and in procuring from the complainant, and Gouverneur and wife, a conveyance of the farm on which he resided as a tenant. That, at different times, the complainant had executed promissory notes to him for large amounts, at a time when he was entirely ignorant of the original consideration and merely upon the agent's representations, without any knowledge of the state of the accounts or any being furnished whereby he might have ascertained whether he was really indebted in the amount of such notes. That some of such notes were continued by renewals, with compound interest charged, and were finally taken up, by assigning various bonds and mortgages to the agent: all of which was done in ignorance of the true state of the accounts, and upon an entire trust of the good faith of the agent. The bill set forth several other transactions in relation to bonds and mortgages, in which the complainant alleged he had been overreached and defrauded. That in the year one thousand eight hundred and twenty-six, the agent obtained a note from him for two hundred and fifty one pounds six shillings and two pence, but did not furnish any statement of his general account, nor did the complainant examine any part of his accounts, but gave the note thoughtlessly, and relying entirely upon the representations of the agent, and believing all errors would be rectified on a general settlement. That, upon receiving monies at different times from the agent, this complainant had given receipts, which purported to be in full, and had also signed some of the accounts as correct; but, upon the signing of accounts and receipts in full, the complainant never examined the general account or

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vouchers, nor were vouchers exhibited, and he put his name to them in ignorance of their true state, being extremely thoughtless in money matters, and particularly with the agent, for whom he was in the habit of signing all papers suggested by him, without reflection, and in full confidence. That he had not knowingly or intentionally released the agent from his general liability to account for his agency during the whole period of the time or any part of it. That he had lately called for an account of transactions commencing with the agency; and after various negotiations, the agent had rendered an account, beginning with the year one thousand eight hundred and eight but refused to render any prior to that time, alleging a receipt in full to have been given up to this period; and that no account of the agency, since one thousand eight hundred and eight, shewing the agent's receipts and payments or how the property had ever been disposed of or what remained due at the times of obtaining the receipts in full, had ever been rendered.

The bill alleged the accounts rendered since the year one thousand eight hundred and eight, to be grossly defective, and as containing many improper charges; and proceeded to point them out. It prayed, amongst other things, a general account of both agencies, from the commencement of them.

The defendant, Amos Belden set up his accounts with Mrs. Ogilvie to within a short time of her death, as settled accounts; and the same thing with regard to his agency for Captain Philips, up to the twenty-sixth day of November, one thousand eight hundred and twenty-six: and, consequently, that the complainant was not entitled to call for a general account at the present period.

In support of the answer, and as evidence of the settlements, the defendant produced various stated accounts between him and Mrs. Ogilvie, and between him and Captain Philips, made at different times and in regular succession, and which had acknowledgments written at the bottom, explanatory of their being settled accounts, signed by the party, and then receipts subjoined, specifying the sums and payments of balances. The signatures were admitted to be genuine; and, in many instances, the bodies of the receipts and acknowledg-

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ments given by Captain Philips were in his own hand writing. The accounts exhibited by the defendant, as thus settled with Mrs. Ogilvie, commenced in the year one thousand seven hundred and ninety-two, and appeared to have been regularly continued, with settlements at reasonable distances, down to one thousand eight hundred and seven. On the ninth day of December, one thousand eight hundred and six, a short account was made up and the balance paid to her, when she signed a receipt, expressed to be in full for money on bonds and notes. On the twenty-first day of January, one thousand eight hundred and seven, Mrs. Ogilvie gave another receipt to Mr. Belden, for two hundred and sixty-two pounds, six shillings and three pence, in full for money collected of the tenants to that day. The accounts which the defendant exhibited, as settled between him and Captain Philips, commenced with the agency, in one thousand seven hundred and ninety-one, and terminated in the year one thousand eight hundred and twenty-six. The last of the series, embracing a period of nine months, from February to November, one thousand eight hundred and twenty-six, and made out (like the preceding accounts) in the form of debit and credit, giving the items in detail, with dates and sums, and stating a balance against Captain Philips of two hundred and fifty-one pounds, six shillings and two pence, was underwritten and signed by Captain Philips, as follows :

“ Nov. 26. Settled—I giving my note for the balance due to Amos Belden, viz. £251. 6. 2.” “ Fred’k. Philips.”

The following were the facts which the court deduced from the pleadings and proofs : As to Mrs. Ogilvie : the defendant made up accounts from time to time, as her agent, which, with the aid of books, contained all the particularity necessary to a full understanding of the different entries. These accounts he brought with him to the house of Mrs. Ogilvie, in the city of New York, where he lodged during the time he remained in the city ; and there he submitted them to her inspection and examination. He likewise generally brought his original book of accounts with him, containing the general account current between him and Mrs. Ogilvie, and which showed the amounts received for rents, and on notes, sales or otherwise ; also a book in which he

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had taken copies of all receipts given by him for monies collected or received, and showing on what account each sum of money had been paid to him; and, in addition, he used to produce or had in readiness to exhibit all vouchers which could be asked for, to show his accounts correct. Thus prepared, the parties used to sit down together, Mrs. Ogilvie would cursorily examine the accounts, and look into the books; Mr. Belden would explain such items to her as appeared to require it; and then, she seeming to be satisfied, he would pay her the balance as stated, and for which she would sign a receipt, and, at the same time, acknowledge the account to be settled. In all these transactions, the greatest friendship prevailed; and the lady reposed in her agent the most unlimited confidence. She was of a mild and easy disposition, had a naturally good capacity, was well educated, and independent in her circumstances; living in her own house, at an expense of about four thousand dollars a year, and superintending the disbursements relating to her establishment. Until within a year previous to her death, Mrs. Ogilvie was able to look into accounts, and had capacity sufficient to understand them, provided she applied her mind to the subject, and to understand the nature and effect of receipts: but, from her habits of life and disposition, she did not apply herself to such matters or bestow upon them the attention necessary to detect errors in an intricate account. It was only during the two last years of her life, while laboring under infirmity incident to age, that she employed a house keeper. The illness, of which she died, was of short duration. Her son, Captain Philips, resided with her. There were several relatives, and intimate friends, men of high character, intelligent and of business habits, who frequently visited her; but she never called upon any of them to assist in examining or settling accounts or in any matters of business. She was in the habit of relying entirely upon the integrity of those she employed or with whom she dealt. In Mr. Belden she had the most implicit confidence; and would sign papers which he handed to her, without scrutinizing or examining the same in order to ascertain whether they were correct or proper.

The same kind of confidence, and to a like extent, was felt

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on the part of Captain Philips, in Mr. Belden, and the like friendship subsisted between them. He had received a liberal education, was a Captain in the British army, and had been in active service during the revolutionary war. He retired at the close of it, and received his half pay for life. He lived as a gentleman, was fond of ease, spent his cash freely, and was thoughtless and indifferent about money concerns. But he was, nevertheless, intelligent, possessing more than ordinary talents, was capable of understanding and settling accounts and transacting business, and frequently gave directions, and attended personally to his affairs. And yet, his habits of life had produced in his mind an aversion to any business which required application, as, for instance, the investigation of accounts; and this aversion disqualified him, in a great measure, from sitting down and applying himself to such subjects. Hence, his practice was, to glance at accounts, when presented; and to pay them without much examination. He trusted to the integrity of others; and kept no books of accounts of any consequence. Mr. Belden's method of making out and submitting his accounts to Captain Philips for settlement, and of producing his books and vouchers, and the manner of examining them, when together, and the coming to a settlement, were in all respects similar to the course pursued with Mrs. Ogilvie. In this way opportunities were afforded, both to Mrs. Ogilvie and Captain Philips, for investigating the correctness of the agent's accounts, and detecting errors, if any existed. But neither of them ever went into a minute examination of the accounts.

Mr. J. Duer and Mr. J. Blunt argued for the complainants, on the following points:

(As to Mrs. OGILVIE's Accounts.)

1. That there was no such settlement of accounts between Margaret Ogilvie and Amos Belden in the bill mentioned, as ought to be a bar to the account now sought.
2. That the accounts with Mrs. Ogilvie, as exhibited, con-

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tain errors and extravagant charges; and, on that ground, ought to be opened.

3. That lapse of time does not apply as an objection until after the confidential relation subsisting between the parties, and the influence growing out of the same, had ceased.

4. That the said Amos Belden has so connected and blended his account of Mrs. Ogilvie's estate, with his accounts of Captain Philips' estate, that the latter account cannot be correctly settled, without the former be first revised and adjusted.

(As to Captain PHILIPS' Accounts.)

1. The first three points above taken, are also here taken as applicable to the accounts between Captain Philips and Amos Belden, as his agent, as in the bill in this cause mentioned.

2. That, supposing there had been such a settlement of accounts between Capt. Philips and Amos Belden, as would *prima facie* be a bar to opening the same, yet that there is evidence of such Breaches of Trust on the part of Amos Belden, as Agent of Capt. Philips, as to render it the duty of this Court to open the whole of the said accounts.

3. That the sale of the Farm and advance to Joseph Hopkins by Amos Belden, as in the Bill mentioned, and the securing his own debt thereby against Hopkins, were gross Breaches of Trust, for the loss resulting from which the Estate of Amos Belden is in equity responsible.

4. That the canceling of the bond and mortgage of Stephen Swift, by the said Amos Belden, as set forth in the Bill, is not explained or justified by the evidence or pleadings; and that the Defendants are responsible for the loss thereon.

5. That the charging of compound interest, by the said Amos Belden, upon the notes and securities obtained by him from the said Capt. Philips, and alledged to be due, and the payments thereof, as obtained by him from Captain Philips, were also breaches of trust, which can only be corrected by opening the accounts between them.

6. That, in any view of the case, the complainants are entitled to a decree for a reference of the accounts between the

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said Margaret Ogilvie and Amos Belden, and the accounts between Captain Philips and Amos Belden, to a Master, with liberty to the complainants to surcharge and falsify.

7. That the notes obtained from Capt. Philips by Amos Belden, ought not to be allowed, without proof of consideration. That the purchase of the Farm by Amos Belden, from Captain Philips, as stated in the pleadings, was, under the circumstances, absolutely void; and that the complainants are entitled to a re-conveyance thereof.

Mr. Gerard, and *Mr. S. A. Foote*, based their arguments upon these points:

I. The accounts with Mrs. Ogilvie are stated and settled accounts:

1. On account of the receipts and settlements.
2. Because the accounts were settled in the mode agreed upon by the parties.
3. On account of the lapse of time in which they have been acquiesced.

II. No fraud in settling them is shown; and nothing short of that can open them.

III. The accounts with Captain Philips are settled and stated accounts:

1. On account of the receipts and settlements.
2. Because the accounts were settled in the mode agreed upon by the parties.
3. On account of the lapse of time in which they have been acquiesced.

IV. No fraud in settling them is shewn; and nothing short of that can open them.

V. The allegations in the Bill as to the Belden farm, are unfounded.

VI. If true, they afford no reason for opening the accounts.

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VII. The allegations in the Bill, as to the Hopkins farm, are unfounded.

VIII. If true, they afford no reason for opening the accounts.

IX. Any mistakes or inaccuracies pointed out in the accounts, afford no reason for opening them, beyond rectifying such mistakes or inaccuracies.

X. The Defendants are entitled to the commission of five per cent. on the sales not charged in the settled accounts; and a reference must be ordered to a Master to ascertain the amount of sales on which that commission is to be charged and the amount of the note for two hundred and fifty pounds, on the settlement in November 1826, now held by the Defendants.

XI. The Swift bond and mortgage was paid by Mr. Belden to Captain Philips, at the time it was cancelled; and it was not a subject to go into his agency accounts, or for which, in the ordinary course of business, he would take a voucher.

THE VICE-CHANCELLOR.—Under the circumstances detailed in this case, it is insisted, on the part of the complainants, that even supposing there was no actual or intentional fraud practiced by the agent in obtaining the settlements, yet they ought not to stand and are still to be deemed open accounts; and, especially, that where such a confidential relationship exists as is proved in the present case, the policy of the law is against considering accounts as closed and settled, unless the party setting up the defence proves affirmatively the correctness of them. As a general rule, where an account is made up and rendered in due form, he to whom it is rendered is bound to examine the same or to procure some one to examine it for him; and if he admits the account to be correct, it becomes a stated account and is binding upon both parties,—the balance being the debt, which may be sued for and recovered at law upon the basis of an *insimul computassent*. So, if instead of an express admission of the correctness of

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the account, the party receiving it keeps the same by him, and makes no objection within a reasonable time, he will be considered, from his silence, as acquiescing, and be equally bound by it as a stated account. And whenever the balance appearing to be due by such stated account is paid, it then becomes a settled account. This is the result of the agreement and acquiescence of the parties in the correctness of the accounts, and of their concurrent acts—the one in paying, and the other in receiving the balance. If either party attempts to impeach the settlement and to open the accounts for re-examination, either wholly or in part—and which can only be done on the grounds of fraud, mistake or error—the burthen of proof rests upon the party impeaching, and he must prove the fraud or point out the error or mistake on which he relies. These are the plain and familiar rules which govern in ordinary cases. Are the circumstances here presented sufficient to justify a departure from them?

The aversion of Mrs. Ogilvie and Captain Philips to examine accounts, and their reluctance to look into them minutely for the purpose of satisfying themselves, instead of relying altogether upon the “blind confidence,” as it has been termed, in their agent, is not to be imputable to the defendant—nor was it caused by his means. It arose from their own inert dispositions and the habits they had formed. It was not Mr. Belden’s fault if they did not choose to examine for themselves or employ others sufficiently skilled in accounts to attend to examinations and settlements on their behalf. They should have done one or other of these things, unless they were perfectly satisfied to forego the privilege. If they preferred the latter, they ought not now to complain. The agent rendered his accounts periodically, exhibited his books and vouchers, invited an investigation preparatory to a settlement, and afforded time and opportunity for it at the party’s own house and where they could have had any assistance they might have desired. This was all which the accounting party had to do. His conduct, on these occasions, as to the manner of proposing and effecting the settlements, for aught that appears, was upright, fair and honorable. They were willing to admit his accounts as presented; and they settled with him accordingly.

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But their incapacity to understand long and complicated accounts, is urged as a reason against the settlements. Here, again, was a fault of their own. It is not one which can be attributable in any way to the agent. They were not persons labouring under such weakness of intellect or imbecility of mind, as to disqualify them from managing their affairs in general, and to render it improper for other persons to deal or make contracts with them:—far from it: they merely were not accountants. In this consisted their deficiency—a deficiency which they should have remedied by application to the subject of accounts or supplied by calling in the skill of others. Their omission or neglect in this particular ought not to be the foundation of an objection on their part to the settlements which they thought proper to make, without taking pains to investigate for themselves, (if such was the fact) or employ others to do it for them. Even as respects Mrs. Ogilvie in the two last years of her life, when old age had brought on bodily infirmity, her mind remained sound, and she could have availed herself of the assistance of friends to examine accounts presented by her agent. And, besides, her son, Captain Philips, residing in the same house, must have known when the agent was there with his accounts for settlement; and if, during this period, his mother stood in need of assistance, he was at hand, to assist or procure aid for her. The objection on this ground, therefore, fails.

The next objection is founded upon the circumstance of unlimited confidence, and the relation which the nature of the agency created between them. The policy of the law is strongly against permitting certain classes of transactions to stand, which have been entered into, where a confidential relationship exists between the parties, without allowing an inquiry. It looks upon them with a jealous eye: because there is room to suppose the party, claiming the benefit of the transaction, may have availed himself of knowledge acquired from his situation as agent or trustee, or exerted an improper influence which such situation has given him, or, possibly taken some advantage of the confidence he enjoyed, and turned it to his own account:—in other words, that the parties have not dealt upon equal terms. In such cases, this court will, in general, interfere

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and institute an inquiry into the transactions, without direct evidence of fraud or imposition, and will put the parties back to where they stood in reference to the subject matter of the agreement before they entered upon it.

But, the present is not a case falling within this rule of policy ; and none of the numerous cases to which I have been referred extend the doctrine to a settled account between principal and agent, where there has been an actual accounting, even although there may have been confidence and trust.

In the recent case of *Jenkins v. Gould*, 3. Russ. Rep. 385., a settlement, in relation to the defendant's accounts, as the plaintiff's solicitor, receiver and manager of his estates, was set aside. But there, the defendant had never delivered any bill of his costs as solicitor ; and had never rendered or prepared any account of his receipts and payments as receiver and manager. Also, while standing in this confidential situation, he had obtained from the plaintiff a mortgage of his estates as security for the balance of his accounts. And without ascertaining, by any examination or even production of his accounts or vouchers, what the balance really was, (the defendant insisting that a large balance was due to him,) he obtained from an agent of the plaintiff's, who was empowered to settle and compromise with him, an agreement by which the plaintiff should pay him a gross sum, in full, and this was to be a final settlement between them. The Court held, considering their relative situation of solicitor and client, agent and principal, and on account of the duty of the former to keep regular accounts and render them in due form, that he should not avail himself of his own neglect or omission of duty ; and decreed the accounts to be investigated. The present case is widely different ; because accounts were rendered. The same marked distinction will be found to exist in regard to other cases. Thus in *Middle-ditch v. Sharland*, 5. Ves. 87, a receipt in full was set aside, and an account directed. The decision went upon this ground, amongst others, that the defendant did not, at the time of obtaining the receipt or at any other time, deliver any regular account in writing to his employers. The Master of the Rolls observed : " The nature of the defendant's employment, which was that of a land steward, imposed up-

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on him the duty of keeping accounts; and the circumstances which he disclosed by his answer were not sufficient to excuse him, as steward, for the monstrous negligence in keeping no account whatever. Therefore, for the sake of the precedent, he was bound to order an account of all the dealings and transactions; and decreed the receipt should not serve any further than as evidence of so much money paid. So, in *Salkeld v. Vernon*, 1. Eden, 65, a bill was filed by a residuary legatee against executors, for an account. A release was set up, but the Lord Keeper put it aside and decreed an account, mainly upon the ground that the release had been obtained without an account from the executors of the personal estate. He deemed it a necessary ingredient to support such a release that an account should be rendered. On the other hand, *Davies v. Spurling*, 1. Tam. R. 199, & S. C. 1 Russ. & M. 64, is an authority to show, if an authority were necessary, that where accounts have been rendered by an Executor, Agent or Trustee, and, after being examined, the same are admitted to be correct and an acknowledgment to this effect is signed and the balance paid, such a settlement will not be disturbed, nor the accounts ordered to be retaken under the direction of the Court, unless for fraud or surprise in the settlement clearly proved or so far as errors in the accounts can be pointed out.

There is a numerous class of cases in the books, where, it is true, the Court of Chancery has gone pretty far in opening accounts, upon the ground of settlements having been made during the existence of a confidential relationship. These are between Attorney and Client, or Solicitor and Client. Still, in all the cases of this description to which I have been referred, or which have fallen under my observation, in addition to professional confidence, as a ground for interference, there has existed special circumstances, showing fraud and imposition practised upon the client, or an undue use made of the power and influence which the relation of Attorney and Client has given the former over the latter, and of which he had taken an unconscientious advantage. The cases of *Wharton v. May*, 5. Ves. 27. and *Vaughan v. Lloyd*, before Lord Thurlow, there cited, *Purcell v. McNamara*, 14. Ves. 91., *Lewis v. Morgan*, 5. Price, 42. S. C. 4.

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Dow, 29. and 3, Young and Jervis 230, and *Jenkins v. Gould, ut supra*, are all instances of this sort. Even if the Court should be called upon, in a case between Solicitor and Client, to set aside a release and to open accounts, in the absence of any thing like fraud, I apprehend it would be for reasons of public policy and upon principles peculiar to such cases; and which do not apply as between principal and agent, manager and steward disconnected with professional calling or the character of a legal adviser: 5 Price 43 n. & 55. On this topic it is unnecessary to enlarge.

I am convinced there is no good reason why accounts, which have been settled in a case of a stewardship or agency like the present, should be opened and the agent or his representatives be subjected to a new accounting under the direction of the Court, merely because, at the time of the settlements, the agent possessed the unbounded confidence of his principal. On this ground the Court cannot interfere. If the accounts are to be opened at all, it must be for other reasons and upon more substantial grounds.

This brings me to the consideration of the alleged frauds, overcharges, mistakes and errors, and the effect which these, when ascertained, are to have upon the settlements.

As respects fraud in the settlement of Mrs. Ogilvie's accounts, none, indeed, appears. An objection is taken to the manner of stating some of the accounts; because the credit side contains only a sum in gross, without a detail of items. It is also made a point that the Agent did not keep and furnish rent rolls and other proper statements of property and income; and has not been sufficiently distinct in his accounts as to what belonged to Mrs. Ogilvie and what to Captain Philips. All these matters, even as shown, are far from being evidence of fraud; nor does any loss or injury appear to have resulted to the principals, from such keeping and rendering of accounts. If they were not so full and explicit as to be satisfactory to Mrs. Ogilvie, she should have objected at the time. After what has taken place, these circumstances are not enough to warrant the opening of them.

Then, as to what are alleged to be overcharges or errors, and which are pointed out as grounds for granting leave to the complainants to surcharge and falsify. These consist of

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two things, namely, charges of five per cent. Commissions on the sales of land for Mrs. Ogilvie, in addition to the stipulated commission of seven and a half per cent., and a charge of interest on three hundred pounds paid to Thomas Belden for a period of three years.

The commissions objected to are found in two accounts, one settled in the year seventeen hundred and ninety-nine, and the other in eighteen hundred and one. They are charged on certain sums, as being the amount of sales of lands, and are entirely distinct from the other commission of seven and a half per cent. on the amount of collections of Rents and notes. They formed very conspicuous items in the accounts, so as to have been easily perceived even upon the slightest examination, and are, likewise, so plainly expressed as to be understood by the most ordinary capacity. Mrs. Ogilvie has signed these accounts as settled; and upon payment of the balances which were in her favour, she gave receipts in full. In addition to the evidence thus afforded of the correctness of the charges, the defendant is called upon, by the bill, to say, whether his accounts were not overcharged in this respect, and he denies they are, and avers that the five per cent. upon the sale of lands, in addition to the seven and a half for collecting of monies, was authorized and Mrs. Ogilvie knew of it, and he insists upon the same being just, and of its having been allowed by her knowingly. This is evidence of an agreement on her part to allow the five per cent. as well as the seven and a half per cent. commission. It stands uncontradicted; and I should not be justified, in the face of the agreement and of her actual allowance of both commissions distinctly presented in the accounts, in permitting the complainants now to falsify the charges.

Then, as respects the interest money of twenty-one pounds a year paid on the debt due to Thomas Belden. This is charged as having been paid for three years in succession. There is no allegation in the bill, drawing in question the correctness of the accounts in this particular; and, of course, there is nothing in the answer relating particularly to the subject. On the hearing, it was, for the first time, suggested to be an error or a charge in the accounts which the defen-

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dant ought not to have made, because, as the Counsel said, it appeared, from the accounts themselves, that the defendant had balances in his hands sufficient to have paid the debt and ought to have paid it, and stopped the interest; or, if he permitted the interest to accrue against Mrs. Ogilvie, he should have allowed her interest on the balances in his hands. I am not satisfied that, in point of fact, monies belonging to Mrs. Ogilvie remained in the defendant's hands any length of time. He was in the habit of paying her over sums from time to time as the money came in and whenever convenient opportunities offered to send it to her, obtaining her receipts for such payment on account, and then, at reasonable intervals, making the settlements before spoken of and paying her the balance,—the accounts being made up of his collections at different periods on the one hand, and his disbursements and payments on the other. In running accounts of this sort, it may well be, and doubtless often was the case, that he had but small amounts remaining in his hands for any length of time. Hence, it may be unjust to charge him with interest or to impute negligence to him in not paying off the debt due to Thomas Belden. Besides, it is said, and I think truly, the defendant was not bound, without the express direction or authority of Mrs. Ogilvie, to apply the funds in his hands to the payment of her debts, and he is not to be charged with a breach of duty in this respect until the complainants shew she gave him such authority or direction. And as he paid the interest and charged the same in his accounts, and which she has allowed and settled as being correct, the presumption is that his authority extended no further and that it suited her convenience to let the principal remain a few years unpaid. For these reasons, I cannot but think this last ground, upon which it is urged that the complainants ought to be let in to surcharge and falsify, is likewise not sustained,

Upon the whole, in regard to the accounts with Mrs. Ogilvie, even if the grounds assumed were such as could be deemed sufficient, under other circumstances, to let the complainants in to a partial scrutiny of the accounts or to require the defendant to submit to an entirely new accounting, as if no settlements had ever taken place, still, under present

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circumstances, the Court ought not and cannot with any degree of propriety interfere.

It is a wise and salutary provision of the law, which permits time to draw a veil over the transactions of men; and equity, acting upon this benign principle, gives great effect to the lapse of time, and discourages claims not promptly made, especially where there has been no personal disability or other impediment in the way of asserting them. Here has been none; and yet, from the time of Mrs. Ogilvie's death (when all her rights devolved upon her son), a period of twenty years or thereabouts has been suffered to elapse, without objection to any part of the accounts and without the least intimation or assertion of claim arising upon them. If this long acquiescence is not an absolute bar, it is, at least, a circumstance to require at this day much clearer proof for opening and re-investigating the accounts than is at present furnished: *Hampson on Trustees*; 99.; *Ellison v. Moffat*, 1 John. Ch. Rep. 46.; *Rayner v. Pearsall*, 3. Ib. 578.

My conclusion on this part of the case is that Mrs. Ogilvie's accounts must stand as settled accounts; and that the complainants have not shown enough to entitle them to surcharge and falsify, especially at this late day.

I now proceed to the account with Captain Philips. For the reasons already given against opening the settlements made with Mrs. Ogilvie, on the ground of the confidential relationship and the slight examination of the accounts when presented, it is manifest the settlements with him, as acknowledged under his hand, should not be set aside. The same principles apply and the reasons are still stronger against him why the accounts should not be opened upon these grounds. Nor do I think there is any thing which can possibly be construed into fraud on the part of Mr. Belden, in the mode of keeping and rendering his accounts or in the manner of settling them with Captain Philips, so as to require the interference of the Court to the full extent of subjecting Mr. Belden or his representatives to an entirely new accounting. I shall, therefore, leave these accounts likewise to stand and to be treated as settled accounts between Captain Philips and Mr. Belden.

But there are sufficient reasons why the complainants

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should have liberty to surcharge and falsify them to a certain extent. Although the scope and object of the bill is for a general account as if no settlement had ever taken place between the parties, yet, it is so framed that, upon the defendant's setting up and proving stated accounts so as to protect himself from a general accounting, the complainants may nevertheless be entitled to an inquiry into the accounts as stated and settled for the purpose of shewing errors and omissions. The Bill charges a variety of errors and omissions; and upon which the parties are at issue. The state of the pleadings, therefore, admits of the introduction of proofs on these points. In such a case, and where enough appears to induce a belief of errors having occurred and that the accounts require to be corrected, it is the duty of the Court to permit it to be done, by giving leave to surcharge and falsify: *Brownell v. Brownell*, 2 Bro. C. C. 62; *Taylor v. Haylin*, *Ib.* 310. and *S. C.* 1, Cox, 435; *Johnson v. Curtis*, 3 Bro. C. C. 266; *Kinsman v. Barker*, 14 Ves. 579.; and see 9 Vesey, 266.

Among the alleged overcharges and errors in the accounts between Mr. Belden and Captain Philips, there is one of compound interest upon certain notes given by the latter to the former. Such an error, I am inclined to think, will be found to exist; and, if so, it should be corrected: unless allowing it to stand can be justified by the rule laid down in *The State of Connecticut v. Jackson*, 1 *John. Ch. Rep.* 12, and *Van Benschooten v. Lawson*, 6. *Ib.* 313. This forms a proper subject of inquiry for a Master. So, in regard to the alleged omission in the accounts of the money arising from Swift's Bond and Mortgage. Mr. Belden appears to have been in a state of uncertainty as to whether he had ever credited this money in his accounts or paid it over to Captain Philips. This circumstance affords another reason for permitting the accounts to be examined; and, to be corrected by the Master, if he shall find the money has not been credited or paid to Captain Philips. Mr. Belden has, moreover, in some of the Schedules annexed to his answer, pointed out errors and omissions which he has himself discovered, and which must, necessarily, require investigation in a Master's Office; and he also claims to charge a certain commission,

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omitted in his accounts, which he insists he is now entitled to demand.

I mention these alleged omissions, errors and overcharges, in order to show the propriety of permitting an investigation, so far as they are specially pointed out in the pleadings. Either party may have liberty to surcharge and falsify; but in so doing, they must confine themselves to such matters as they have expressly and specially alleged to be overcharges, errors or omissions. I shall not permit them to go further. It is desirable to limit, as much as possible, the subjects of inquiry in the Master's Office. In order to understand clearly the application of the terms "surcharge" and "falsify," and the difference between this course and taking an account generally, it is well to observe that where liberty is given to surcharge and falsify, the Court takes the account to be a stated and settled account and establishes it as such. If either party can show an omission, for which an entry of debit or credit ought to be made, such party surcharges, that is, adds to the account, and if any thing should be inserted which is wrong, he is at liberty to show it, and this is a falsification. The *onus probandi* is always on the party making the surcharge or falsification; and if he fails to prove it, the account must stand as correct. It is presumed to be correct, after having been once settled, until the contrary appears. Here lies the difference between this and a general accounting: for, in the latter, the party producing the account must shew the items to be correct: 1 Mad. Chan. Prac. 83.

There are some points about the accounts to come before the Master which call for the opinion of the Court; and which it is right should be so settled by way of special directions on the reference. The facts of this case are as fully before the Court as they are ever likely to be; and a full opinion now may be the means of preventing exceptions and further discussion. The first point is in relation to the Hopkins' farm. The accounts of Mr. Belden with Captain Philips contain an item of debit, under the date of the eighteenth day of February one thousand eight hundred and fifteen of four hundred and seventy eight pounds, as sundries paid to Joseph Hopkins and secured by his bond and mortgage to

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Captain Philips. This sum, equal to eleven hundred and ninety five dollars, is composed of five hundred dollars advanced by Mr. Belden on Captain Philips' account to one Joseph Hopkins and of six hundred and ninety-five dollars of debt due by Hopkins to the defendant in his own right. These sums were included in and formed part of the consideration of a bond and mortgage executed by Hopkins to Captain Philips through the agency of Mr. Belden for four thousand four hundred and sixty-five dollars on the eighteenth day of February one thousand eight hundred and fifteen upon a farm of one hundred and eighty acres at that time conveyed by Captain Philips to Hopkins, and on which he had resided as tenant for many years. The other parts of the consideration for the bond and mortgage were made up of the whole purchase money of the farm at the appraisal of ten dollars per acre in the year one thousand eight hundred and ten with interest upon it from that period and other indebtedness which Hopkins was under to Captain Philips for rent of the farm. In order to reimburse Mr. Belden in part for the five hundred dollars advanced and to pay the debt owing to him by Hopkins (which was included in the bond and mortgage) Mr. Belden appropriated to his own use a bond of one William Calkins to Captain Philips for three hundred and seventy-one pounds and eighteen shillings which was in his hands as agent and which he accordingly gave credit for in his account of the same date with the charge of four hundred and seventy-eight pounds. The complainants ask leave to falsify as to the whole of this sum, upon the ground that the advance of five hundred dollars to Hopkins was improvidently made and the giving of a deed to Hopkins and taking back a mortgage was, under the circumstances, a mere contrivance of the agent's to obtain payment of his debt, which Hopkins, who was an old man and insolvent, was unable to pay, and that it was making Captain Philips assume a debt without adequate security—the original purchase money of the farm with interest and the prior indebtedness to Captain Philips being as much or more than the farm was worth—and that the consequence has been a loss to Captain Philips of several thousand dollars. And the complainants counsel say, he, Captain Philips, was drawn into and assented to the arrange-

ment from a blind credulity and misplaced confidence, against which the agent was bound to protect him: and, consequently, the loss of this money should be borne by the agent. I have carefully looked into this transaction, as set out in the bill and answer, and have examined all the testimony brought to bear upon it, and after the most deliberate consideration, I am of opinion Captain Philips is bound by the assent which he appears to have freely given to the sale of the farm to Hopkins and to the advance of the five hundred dollars towards paying his debts, as an inducement to him to purchase. The testimony of Mrs. Philips and George Belden go far to show that Captain Philips himself agreed with Hopkins to make the advance; and I am inclined to think this is the truth of the case, whatever Hopkins may say to the contrary. His extreme age and loss of memory easily accounts for the discrepancy. But I am not convinced and the evidence certainly fails to prove that Captain Philips ever agreed to assume or take upon himself the absolute payment of Hopkins' debt to Mr. Belden. He may have known and assented to its being included in the mortgage: but there could have been no sufficient reason or motive for his assuming, at all events, the payment of this debt. If he did do this, it was a gratuitous act; and the value of the farm was certainly not a security equal to the mortgage debt and the interest of one year, which it had to run. Under such circumstances, the defendant should have proved an express agreement, founded upon a consideration of assuming and running the risk of payment: because it is, in effect, an undertaking to pay the debt of another. The mere including it in the mortgage security is not sufficient, unless the security proved available to the full extent of satisfying this and the other monies which it was intended to cover. The mortgage has failed of its object in this respect. Although Captain Philips has accepted a release of the equity of redemption or has, by other means, obtained possession of the farm, still it was not in satisfaction of the whole mortgage debt. In point of value, it was insufficient to satisfy his own debt. While the estate of Captain Philips sustains a considerable loss in this respect, it is not equitable or just to throw also upon him the loss of Mr. Belden's debt. It has been sugges-

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ted in argument, that Captain Philips, by his subsequent acts, sanctioned and ratified the whole transaction. I do not find, in any of his subsequent acts, the clear and decisive evidence which I think the case calls for, of his having agreed to assume the debt in question and run the risk of its being paid out of the mortgage property or by Hopkins personally. For these reasons, I shall give the complainants leave to falsify the charge of four hundred and seventy-eight pounds to the extent of six hundred and ninety-five dollars, but not as to the five hundred dollars residue; and it will be the Master's duty to correct the accounts accordingly.

The next and only remaining point in controversy which it is necessary for me to notice, is the Belden farm. This is the farm on which Mr. Belden resided as tenant for several years and then purchased at an appraised value. The professed object of the bill is to set aside the sale and to have a reconveyance of the property with a full account of rents and profits, with an enquiry as to the consideration money paid for the same. But the complainant's counsel have waived the claim to a re-conveyance and insist upon the right of inquiring into the consideration of the sale, since it was a sale by the land owner to his steward or agent, alleging the price to have been far below the actual value, and, therefore, the agent is bound to account for a full and fair price for the land, unless he can show he has already done so; and the burthen of proof, it is contended, rests upon the agent. The sale took place in the year one thousand eight hundred and four. The farm consisted of three hundred and sixteen acres and the price was eighteen dollars and fifty cents per acre, amounting to five thousand eight hundred and forty-six dollars. A number of witnesses on both sides have been examined as to the value of the lands at that time; and they differ in their estimates. Some think the price, just mentioned, its full value; while others estimate it to have been worth twenty dollars and some twenty-five dollars an acre. The preponderance of the testimony is not much beyond eighteen dollars and fifty cents an acre. Even admitting the question of value to be an open one at this time, on account of its being a transaction between a steward and his employer (see, *Lord Selsey v. Rhoades*, 2. S. &

§. 41:), yet I should not be warranted, at this time of day and under the circumstances, in directing Mr. Belden to be charged with an increased value of the land. There is one circumstance which I think shows very conclusively that all parties must have been perfectly satisfied with the price and the fairness of the transaction and that too after abundant time for reflection had been allowed. About eight years had elapsed when it was discovered that Mrs. Gouverneur was entitled to an estate in remainder in fee in a portion of the land comprised in the farm; and on being applied to by Mr. Belden, she and her husband Mr. Gouverneur (both of whom are here as complainants) executed to the defendant a deed of release and confirmation, without requiring any additional consideration to be paid. This could only have proceeded from a conviction of the fairness of the purchase from Captain Philips and the adequacy of the price agreed upon for the whole title and estate; and their opportunities of ascertaining and determining this point were certainly as good in the year one thousand eight hundred and twelve (when such release was given) as in one thousand eight hundred and twenty-nine, when the contrary was, for the first time, suggested. I am of opinion the price fixed upon and allowed for the purchase of this farm ought not to be disturbed. As respects the payment of the purchase money, a considerable portion of it appears to have been paid by turning-in notes, accounts and balances which were claimed to be due from Captain Philips to Mr. Belden. So far as these have entered into or grown out of the general accounts between the parties, any errors or overcharges will be reached and rectified by the leave to falsify, provided they are embraced within any of the objections to the accounts pointed out by the bill. Nothing further is necessary to be observed on this subject.

A decree must be entered adjudging the accounts to be settled accounts, and allowing them so to stand. But, in regard to the accounts with Captain Philips, leave is to be given to the parties respectively to surcharge and falsify to the extent and upon the principles already stated, with special directions upon the points I have noticed and endeavour-
ed to settle.

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and others.

Where parties buy real estate with joint funds for partnership purposes, there is no right of survivorship in the lands. Upon the death of one partner intestate, his share descends to his heir.

There are instances, however, of lands held for partnership purposes which will be considered in equity as personalty and be applied accordingly. Thus, it may be agreed by the partners themselves to be so considered; and this agreement will work the change; and the same will go as personalty on the death of one partner. But if a purchase be made and a conveyance taken to partners as tenants in common, without any agreement to consider it as stock, although it be paid out of their joint funds and to be used for partnership purposes, it will be deemed real estate.

As respects the rights of joint creditors of a firm, it is immaterial whether land assumes the character of real or personal estate in becoming partnership property. In either case, it is liable to the partnership debts. But it will not be considered as partnership property liable to co-partnership debts by the mere taking a deed in the joint name of two persons who are partners. It must be done by some express act or understanding.

J. and Mc J. were partners as merchants. They bought in a house and lot upon a mortgage sale, with a view to secure a debt due their firm; they bought other real estate upon speculation, paying for it out of partnership funds and debiting it to "merchandise account"; and they also took up money upon mortgage of the properties, which was put into the same account. They failed in business. Then J. (one of the partners) died, intestate. The surviving partner, Mc J., conveyed, to trustees, all his rights in the above real estate for the benefit of the creditors of the firm. Foreclosures upon the mortgages executed by the partners had been carried through, and a balance of the funds remained in court: It was held, that the real estate was to be considered as co-partnership property and the funds in court liable to partnership purposes.

As the rule is well established that the joint property of the partnership must first be applied to the payment of the joint debts, therefore the administrator of J. was not entitled to any part of the funds in court for the benefit of the separate creditors or next of kin. The right to any balance would be in the heir at law of J.

It was also held: that the widow of J. was entitled to a right of dower. But having joined her husband in the mortgages, she now had an equitable right of dower in a moiety of the equity of redemption and balance in court.

April,
1833.

This case involved a question as to the effect of a purchase of real estate by copartners.

Partnership. Real
Estate
bought by
partners.
Dower in it.

Alexander C. Jackson and Robert Mc. Jimsey had been copartners in trade, under the firm of Jackson & Mc. Jimsey. While they were such partners, they purchased a large amount of real estate with the funds of the co-partnership; and they both joined in mortgaging the same property. One of their purchases of such real estate consisted of thir-

ty-seven lots of land and they debited the amount of purchase to "Merchandize account." All this real estate had been since sold, under decrees of foreclosure, arising from the mortgages made by Jackson and Mc. Jimsey; and surplus monies remained in Court.

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On the first day of June one thousand eight hundred and thirty-one, the firm of Jackson and Mc. Jimsey stopped payment; and on the twenty-fourth day of December following, Jackson died, leaving a widow and several infant children.

About the tenth day of September, one thousand eight hundred and thirty-two, Mc. Jimsey, for himself and as survivor of the firm of Jackson and Mc. Jimsey, assigned and conveyed to the complainants, in trust for the benefit of the co-partnership creditors of Jackson and Mc. Jimsey, all the right, title, estate and interest of him, the said Mc. Jimsey, in the lands, premises and proceeds before referred to; together with a large amount of other property.

Some time in the month of September one thousand eight hundred and thirty-two, Robert Mc. Jimsey confessed a judgment in favor of the complainants; they entered up the judgment, and issued an execution, which was returned *nulla bona*. The complainants had filed, with the record of the judgment, a declaration which specified that such judgment was held by them in trust, to be applied to the same uses and purposes as were contained in the before mentioned deed of assignment; and they now sought to obtain, as trustees, all the balance of funds which had been brought into Court under the foreclosure suits. The widow and infant children of Robert Mc. Jimsey were made parties, as well as Mr. Sylvanus Miller, the public administrator, in consequence of his having administered upon the estate of Alexander C. Jackson.

Mr. Jesse Hoyt, for the complainants.

Mr. O. Bushnell, for the widow Ann P. Jackson.

Mr. J. F. Mitchell, for the public administrator.

Mr. R. R. Ward, for the defendant Robert Mc. Jimsey.

1833. Mr. *Richard J. Wells*, for the infant children of *Alexander C. Jackson*.

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Nov. 11th.

THE VICE CHANCELLOR :—Messrs. Jackson and McJimsey held several parcels of land, under the conveyances to them, in their joint names, as tenants in common, and *prima facie*, in equal moieties. Yet, although the purchases were made out of their joint funds, and, even supposing the same to have been intended as partnership transactions or for partnership purposes, it is a well established rule that there is no right of survivorship in the lands, but, upon the death of one partner intestate, his share descends to his heir at law.

There are instances, however, of lands, held for partnership purposes, which will be considered in equity as personal property and be converted and applied accordingly. On this subject, in the English Chancery, there has been a diversity of opinion. Lord Thurlow held, in *Thornton v. Dixon*, 3. Bro. C. C. 199. (contrary to his first impression) that in order to warrant a conversion of the real estate, which had been purchased and held for the purposes of partnership, into personalty, upon the death of one of the partners, there should be an express agreement for the sale and change of the property: otherwise, upon the dissolution, the property of the partnership would result, according to its nature—the real as real and the personal as personal estate. Upon the authority of this case, Sir William Grant decided, by the cases of *Bell v. Phyn*, 7. Ves. 453. and *Balmain v. Shore*, 9. Ib. 500., in favor of the representatives of the real estate: he being of the opinion with Lord Thurlow that the circumstance of purchasing real estate with partnership funds and for the business of the partnership did not alter its nature or prevent its descent to the heir at law.

Lord Eldon is reported to have entertained different views on the subject; and by his decisions in *Ripley v. Waterworth*, 7. Ves. 425. and *Townsend v. Devaynes*, reported in 1. Mont. on Part. App. 97., especially by the last case, he appears to have decided that the freehold of premises, purchased by partners for the purpose of carrying on the business in which they were engaged, was, on disso-

lution, by death or otherwise, to be considered as personal estate; and see *Gow on Partn.* 52.; *Collyer on Partn.* 76.; also, 2. *Hovenden, Supp.* 40, 41. These were cases in which the question arose between the representatives of the real and the representatives of the personal estate and where in the rights of creditors were not immediately involved. They were, moreover, cases of real estate purchased with partnership funds and held for the purposes of and as being necessary to the partnership business or trade; and in all such cases, whether the property is to be regarded in equity as real or convertible into personal estate depends upon the agreement of the parties. If, at the time of forming the partnership, they agree to invest a part of their capital in the purchase of real estate for partnership purposes or should at any time afterwards find it expedient to do so and agree between themselves that, upon the dissolution, the real as well as personal estate shall be sold and turned into money for the purpose of paying the partnership debts and closing their joint concerns, there the court of Chancery, acting upon the agreement and considering that as done which was agreed to be executed, is warranted in regarding the whole as personalty, either in reference to the claims of creditors or the rights of the heir or next of kin of a deceased partner.

In *Coles v. Coles*, 15. J. R. 159. our Supreme Court has said, there may be special covenants and agreements entered into between partners relative to the use and enjoyment of real estate owned by them jointly and the same will be considered as held subject to such agreement, but, in the absence of such agreement, the real estate owned by the partners must be treated as such, without any reference to the partnership. Chancellor Kent remarks, with respect to the decision of this case, and which was based upon Lord Thurlow's and Sir William Grant's opinions in those before cited, that it is a subversion of the more modern doctrine of the court of chancery in England (and see 3. Kent's Com. 37. 2nd. Ed.) But, however this may be, there is nothing in *Coles v. Coles* to prevent the court of chancery from giving effect to any express agreement which may be found to exist between partners concerning their purchases of real estate. It is certainly competent for them, by agreement between them-

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selves, to change the character of such property. It may be purchased and brought in as stock, and be considered personalty. But, if a purchase be made and a conveyance taken to partners as tenants in common, without any agreement to consider it as stock, although it be paid for out of their joint fund, and to be used for partnership purposes, I am of opinion it must still be deemed real estate. The law will certainly so regard it and equity cannot interfere to alter its character, except upon the ground of an agreement. The decisions in the American Courts, where this doctrine has been discussed (perhaps, with one exception) proceed upon this principle. Thus, in *Mc. Dermot v. Lawrence*, 7. Serg. & R. 438. it was held that the mortgagee of the share of one partner in real estate, taken and held by the partnership for the purpose of carrying on the business of the joint concern, without notice of partnership debts existing at the time of executing the mortgage, was entitled to the benefit of the mortgage security, without being subject to the debts owing by the partnership, and this, upon the ground that, as between the mortgagee, and the partnership creditors, the property was to be considered as real estate; although Chief Justice Tilghman observes, there is no doubt that, by the agreement of the parties, property of that description might be brought into stock and considered as personal property, so far as concerns themselves and their heirs and personal representatives. The cases of *Goodwin v. Richardson*, 11. Mass. R. 469., *Forde v. Heron*, 4. Munf. 316. and *Delorsey v. Hutcheson*, 2. Rand. R. 183. appear to have been decided upon similar principles. The case of *Greene v. Greene*, before the court of Ohio (1. Ham. Rep. 244.) marks more clearly the distinction arising from an express agreement of the partners. There, a bill was filed by a widow for dower in the real estate of her husband, who had been in partnership with the defendants. The property was purchased and the deed taken in the name of the partners, but it was bought with partnership funds and for partnership purposes. The articles of co-partnership contained a stipulation that upon the dissolution of the partnership, all the property of the concern should be sold and the proceeds applied, in the first instance, to the payment of debts due from the partnership.

It was held that the agreement in equity converted the land into personalty as between the partners and their creditors and subjected it to all the liabilities of their joint stock in trade; that, according to the original understanding of the parties, it was to be treated as partnership property and not an estate in land held in common; and that, at the moment of the acquisition of the property it was subject to the condition or agreement of the partnership, which qualified the estate of the husband and so that he had no substantial interest at his death (the partnership then being insolvent) and there was nothing upon which her right of dower could attach.

This is an instance where, upon the footing of an agreement, the equitable doctrine was applied whereby real estate was considered as being converted into personalty, for the purpose of satisfying partnership debts, and where the surplus, if any, would be permitted to go to the personal representative of the deceased partner to the entire exclusion of the widow in respect to dower and the representatives of the real estate; while the former are cases which go to show in the absence of any such agreement, that lands purchased and held by a partnership, even for the purposes of the firm, will, as between the representatives of the real and personal estate of a deceased partner and between the creditors of the firm and a separate creditor who has acquired a lien by mortgage or otherwise upon the individual share of one partner, in good faith, be considered as real estate both in law and in equity.

Upon no other ground than this, I apprehend, can the decisions of the several courts be reconciled; and I see no difficulty in the rule which they so clearly indicate of considering the legal estate in freehold property, purchased by partners for the purposes of their trade or by way of a commercial speculation, as real estate passing by devise or descent in the ordinary course; at the same time, the equitable interest in such property, arising from an express agreement or the clear and manifest intention of the parties, is to be deemed part of the partnership stock, subject to the partnership debts and liable to be applied accordingly.

Collyer, in his elaborate treatise before cited, remarks that

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upon the result of the English cases this seems to be the better opinion.

In *Winslow v. Chiffell*, Harper's E. Rep. of So. Carolina, 25. the majority of the court, on an appeal, held it immaterial whether land assumes the character of the real or personal estate in becoming partnership property, as respects the rights of joint creditors of the partnership: for, if land under either character becomes partnership property, it must, upon principles, be liable to partnership debts. This is doubtless correct; and the doctrine can well be applied, when it is ascertained the lands have become partnership property: yet I think lands can only be rendered so, by some express agreement and understanding of the several partners, and not merely by purchasing with joint funds and taking the title in their joint names—for, in legal contemplation, this would only be creating a tenancy in common in lands, with all the incidents of real estate.

In the case now under consideration, there is sufficient evidence, from the entries in the partnership books and from other circumstances, that Jackson and Mc. Jimsey must have understood and intended the purchases to have been held as partnership property. One house and lot they bought in upon a mortgage sale, with a view of securing a debt due their firm and the other parcels of land in question they bought upon speculation; the purchase money (paid out of their partnership funds on account of the purchases) were charged in their books to the debit of merchandize, while the money taken upon mortgage was, in like manner, credited as advance upon merchandize—thus, treating the transactions in the light of ordinary commercial transactions relating to goods or merchandize and as being within the scope of their partnership business. There was another purchase they made of real estate and which was altogether different, although paid for out of the joint funds: for, there the conveyances were to them in severalty and each was charged in the books with an equal amount of cash to pay for the same. And in the answer of the surviving partner, Robert Mc. Jimsey, it is stated that just before Jackson's death, they had determined to sell the property in question for the purpose of applying the proceeds towards paying their partnership debts. Mr. Jackson's decease prevented it.

Under these circumstances, I think that the real estate, thus purchased and held jointly, may be considered as partnership property and the proceeds liable to be applied to partnership purposes. It was so considered by Mc. Jimsey in making the assignment to the complainants in trust for the purpose of completing the composition previously agreed upon with the creditors. As these creditors are willing to come under the assignment and set up no claims upon the funds in this court adverse to it, there can be no difficulty in making a decree for distribution of the whole of the partnership property among the creditors through the medium of the complainants, as assignees.

The rule is well established that the joint property of the partnership must first be applied to the payment of the joint debts. Hence, the administrator of the deceased partner is not entitled to any part of the funds in court for the benefit of his separate creditors or next of kin. Even though one half or more of these funds were to be regarded as belonging to the individual estate of the deceased partner Jackson, the same being proceeds of real estate, his personal representative could not be permitted to take, since the right would be in the heirs at law.

In no point of view, therefore, has the defendant Miller, as administrator, any claim upon the fund in court.

The next point is, with regard to the claim of dower on the part of the defendant Ann P. Jackson, the widow of the deceased partner. Although the lands were partnership property and the transactions relative to their purchase were of a commercial nature and the proceeds (under the circumstances) are liable to be applied to the satisfaction of the joint debts, yet, in a strict sense, they were real estate and subject to its incidents. The partners were respectively seized of a legal estate of inheritance in the lands as tenants in common, notwithstanding it was to be treated as partnership property; and the right to dower attached as an incident to the legal title and seizin. On this account it became necessary for Mrs. Jackson to unite with her husband in the mortgages. She had still a right of dower in the equity of redemption. This right was not entirely lost by the foreclosure and sale. It attached in equity to the surplus, after

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satisfaction of the mortgage debt. Instead of legal, it then became equitable dower; and which no act, by the husband, could impair, without her concurrence: *Titus v. Neilson*, 5. J. C. R. 452.

In reference to the case of *Smith v. Smith*, 5. Ves. 189., Mr. Park, in his treatise on Dower, 106. observes, that "if lands of inheritance are purchased with partnership property and conveyed to one partner only, *prima facie* he is a trustee for the partnership, and, upon a dissolution, the lands would be distributable among the partners as co-partnership property. But as the partner in whose name the conveyance was taken has the legal estate, coupled with the beneficial ownership in his own share, and as partners are tenants in common in equity of real estate purchased for the purposes of trade, it is apprehended that his wife is entitled to dower of this share." I am disposed to adopt this as the correct conclusion. Upon applying it to the present case, Mrs. Jackson is entitled to dower in the share of the estate, of which the legal title was coupled with a beneficial ownership in her husband, notwithstanding it was partnership property. It can only extend, however, to a moiety. The legal title was not in him beyond this, although his interest in the partnership was a two-thirds. Her dower may be estimated upon the principle of a life annuity; and a gross sum can be paid over or one-third of a moiety of the fund be invested for her use—at her election.

My conclusion on the last point may not seem to be reconcilable with the decision in the Ohio case of *Green v. Green*, where the court proceeded mainly upon the effect of the special agreement in the articles of co-partnership and as to its being sufficient to prevent any right of dower from attaching upon the land. If that decision can be supported upon principle, I apprehend it can only be done through the particular circumstances of the case. It is sufficient to say, the facts in the present suit are different.

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DENSTON and another, assignees of **DICKEY v. MORRIS**
and others, assignees of **SANDS.**

It is a well settled rule of equity that a grantee, to whom possession has been delivered under covenants of title and warranty, can have no relief in this court against his grantor for a return of purchase money or security, on account of a deficiency or failure of title. If a grantee in possession has taken no covenants and the title fails, he will be without a remedy in equity as well as at law, provided the contract were fair and no fraud. But if fraud is shown in making the purchase or in completing it and whether there be covenants of title or not, the purchaser may come into equity for relief or to obtain indemnity against eviction, disturbance, or defect of title. These circumstances take the case out of the general rule.

When surviving assignees in bankruptcy are looked upon as trustees of a fund in their hands, the substituted assignees who are joined with them are so likewise and they should be parties to a suit connected with such a fund.

The statute of limitations or a staleness of demand should be set up by plea or answer and cannot be taken advantage of by demurrer.

Assignees of a bankrupt sold a lot of ground for \$4,300. to I. S. with a promise of covenants in fee and a warranty; the latter took possession and expended money in building; the assignees then refused to give a deed with full covenants or warranty and fixed him down to take a deed with a covenant against their own acts only and took a bond and mortgage for \$4,000. payable in five years, upon the understanding that if their title failed they would return the purchase money and, in the meantime, would not pass the mortgage away; the assignees, without the knowledge of I. S., were notified of an intention to contest their title; I. S. sold to R. D. who paid off the mortgage (the assignees having, against their promise, parted with it); one J. J. brought ejectment upon a paramount title and recovered against R. D. who compromised; and R. D. failed and assigned his property to assignees who filed a bill against the assignees in bankruptcy for repayment of the amount which R. D. had sacrificed upon the compromise. The defendants put in general demurrers: *Held*, that the assignees in bankruptcy not only took the mortgage in trust, but were to be considered as trustees of the money arising from it and that R. D. and those representing him were entitled to the benefit of it; and, consequently, that the demurrers must be overruled.

This case came before the court upon demurrers taken by *April 10th.*
the defendants Robert Morris, junior, John Delafield and 1833.
Charles Rhind to the whole of the complainants bill.

The bill alleged, in substance, that Robert Morris junior, *Vendor and*
and John Mowatt, junior, assignees of the estate of Comfort *Purchaser.*
Parties.
Sands, a bankrupt, falsely stated to one John Sandford that *Statute of*
they, as such assignees, were seized in fee of and were au- *Limitations.*
thorized to sell and convey a lot of ground, known as Num-
ber 73 Greenwich street; and, in order to induce Sandford

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to purchase, represented their title as indisputable and promised, if he would make the purchase, to give him a warrantee deed and defend the lot against the claims of all persons who should lawfully claim the same. That about the first day of April one thousand eight hundred and twelve, Sandford agreed to purchase the lot from them for four thousand three hundred dollars, which was the full value, upon the conditions above mentioned; and they put him in possession for the purpose of his making improvements—leaving the deed to be executed at a future day—and that he forthwith commenced building upon the lot.

After Sandford had expended considerable monies upon the lot, and about the fifteenth day of July one thousand eight hundred and twelve, he applied to these assignees for a warrantee deed; and which they promised to give him. But, shortly afterwards, they tendered to him a deed of conveyance of the lot containing only covenants against their own acts as assignees and for such further assurance as they might, as such assignees, rightfully make whenever requested. That Sandford objected to such a deed and required them to execute a warrantee deed as promised; which they refused: assigning as an excuse, the advice of their counsel not to execute such an instrument—but again assuring him of their title, as assignees, being undoubted. And in order to induce him to accept the deed without covenants, they further proposed and agreed to require a payment of only three hundred dollars in money and to take his bond and a mortgage of the lot for four thousand dollars (being the balance of the purchase money) payable five years after date; and that they would hold the bond and mortgage in their own hands, and not assign the same to any person or claim payment of the principal, until the title of the assignees was established or made perfectly satisfactory to Sandford or his assigns. That they refused to execute any other deed; and threatened if he did not accept of the one which was proffered, to sell the lot to some other person and thereby deprive him of the monies which he had expended in building; and Sandford, relying upon their representations and assurances, finally agreed to accept the deed, and the same was accordingly executed and delivered to him. It was dated the twen-

ty-first day of July one thousand eight hundred and twelve; and thereby the assignees conveyed to him, in fee, all the estate, right, title and interest which Comfort Sands held at the time he became a bankrupt, and which they, as assignees, had or could convey of, in or to the said lot of ground.

Simultaneous (as the bill showed) with the execution and delivery of the deed, Sandford paid to these assignees, Morris and Mowatt, the sum of three hundred dollars and gave his bond and a mortgage of the property for four thousand dollars payable on the twenty second day of July, one thousand eight hundred and seventeen with interest. That this was done upon the understanding before mentioned and upon the further stipulation and agreement of Mowatt, one of the assignees, who delivered the deed and accepted the bond and mortgage, that if the title of the assignees should fail or prove defective from any cause, the assignees would return the purchase money paid and secured by the bond and mortgage. That in violation of the promise not to part with the bond and mortgage, the assignees had, on the fifth day of March one thousand eight hundred and fifteen assigned the same to a Mrs. Grayson, without the knowledge or consent of Sandford and in bad faith towards both him and her: because they then knew or had been informed of their having no title or that it was intended to contest the title as conveyed by them to Sandford. That Sandford remained ignorant of any such defect and intention and went on to finish the buildings erected by him on the lot, consisting of a brick dwelling house and stable; and afterwards sold the same to Robert Dickey for thirteen thousand dollars and conveyed it to him in fee by deed bearing date the twenty-sixth day of February one thousand eight hundred and sixteen. The purchaser, Dickey, discharged the bond and mortgage held by Mrs. Grayson, she having required the same to be satisfied.

The bill further alleged that afterwards and on or about the first day of May one thousand eight hundred and sixteen one John Jackson commenced an action of ejectment against Mr. Dickey in the Supreme Court for the recovery of the land, which action was tried at a circuit court; and in January term one thousand eight hundred and nineteen judgment was rendered thereon in favor of the plaintiff Jackson, his

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title proving to be paramount to that of Dickey as taken from the assignees of Comfort Sands.

The bill then set forth the title under which Jackson claimed and recovered in the ejectment suit; and it charged how, upon the trial, it appeared that the assignees had, long previously to the purchase by Sandford, been notified of the circumstances of such title, and were informed of their having no title whatever as assignees and no right to consider the lot as the property of Comfort Sands at the time of his becoming bankrupt; and that these circumstances first came to the knowledge of Dickey and of Sandford upon the trial of the ejectment suit; and, therefore, as the bill insisted and charged, the assignees acted in bad faith and fraudulently in selling and conveying the lot of land to Sandford in the manner above mentioned. The bill also alleged, that Mr. Dickey being satisfied, from what appeared upon the trial, that the title derived from the assignees was wholly defective and he would be deprived not only of the lot but also of the buildings, and being advised by his counsel to effect a compromise, if possible, he opened a negotiation and finally succeeded in obtaining a release and extinguishment of Jackson's title, by paying to him, in way of compromise, two thousand five hundred dollars—he having agreed to consider the lot vacant, which it was when he purchased. Also, that upon the trial it appeared how the wife of Comfort Sands would be entitled to dower if she survived her husband; and that a release from her was obtained by paying the further sum of three hundred and twenty-five dollars. That although, while the negotiations for the compromises were going on, Mr. Dickey failed in business, yet he completed the arrangements and procured the releases to be executed to himself in the months of July and November one thousand eight hundred and twenty—still, owing to his pecuniary embarrassments, the payments were delayed until the month of February one thousand eight hundred and twenty-one, when the money was paid with interest and the releases were delivered. About the same time and in pursuance of a previous understanding with his creditors, he conveyed the premises (the title to which had then been made perfect) to the complainants, in trust for the benefit of his creditors.

One of the trusts required the complainants to refund the amount which had been thus paid, together with the law expenses of defending the suit and procuring the confirmation of the title: Mr. Dickey having raised the money for those purposes by a temporary loan. Immediately upon receipt of the deed of trust, the complainants advanced, out of their own monies, the sum thus paid, amounting to three thousand two hundred and thirty-nine dollars, which, as they alleged, was necessary in order to perfect the title to the property and render it available to the creditors of Mr. Dickey. And they claimed repayment of the same with interest out of the estate of Comfort Sands in the hands of the defendants, as assignees: because, 1st., they sold the lot to Sandford, the grantor of Dickey, knowing their title to be defective or that it was intended to be impeached or contested; and, 2ndly, for even if they had no such knowledge, they had received four thousand and three hundred dollars as the consideration for the sale of a lot which they had no right to sell and to which they were not entitled.

The complainants also alleged that the defendants, as such assignees, had funds in their hands growing out of the estate of the bankrupt, not yet apportioned amongst his creditors, greatly exceeding the amount paid by the complainants. That Mowatt, one of the original assignees, died in the month of May one thousand eight hundred and twenty-one, when the management of the bankrupt's estate devolved upon Morris, the surviving assignee, who had the sole charge thereof, until the month of June one thousand eight hundred and twenty-six, when the other defendants, John Delafield and Charles Rhind, were appointed assignees jointly with the defendant Morris. That frequent applications were made to Morris and Mowatt, as such assignees, and to Morris as surviving assignee, and similar applications had been made to the present assignees for repayment out of the bankrupt's estate in their hands, but without effect. That recently, at a meeting of the commissioners, creditors and assignees under the commission of bankruptcy held in the month of April, one thousand eight hundred and thirty-two, the complainants presented their claim, verified by affidavits; that the commissioners, having doubts in relation to their powers, directed

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the assignees, by an order entered in their minutes, to retain three thousand dollars in their hands in order to meet the claim if the same should be established in a court of equity or before any other tribunal.

And the bill prayed that the assignees, out of the money belonging to the bankrupt's estate or the defendant Robert Morris, junior, one of such assignees, out of his own proper funds, might be decreed to pay the complainants the amount so paid and expended by them, with interest; and also, for general relief.

Mr. *P. A. Jay* and Mr. *D. S. Jones*, for the defendants and in support of the demurrers.

Mr. *D. B. Ogden*, and Mr. *C. Graham*, on the part of the complainants.

June 25th.

THE VICE-CHANCELLOR:—If there be any ground upon which the apparent equity of this bill can be supported in favor of the complainants, I shall gladly give them the benefit of it. From the statements in the bill it is manifest that by means of the sale to John Sandford, the assignees of the bankrupt's estate have received a sum of money which they had no just right to receive. A decree compelling them to refund would work no wrong either to the bankrupt or his creditors. Still, in order to entitle the complainants to come here in relation to this money, they must have a right to the same or to some portion of it and which must be paramount to the claim of the defendants. If this prove not so, then there can be no relief upon the present bill; and, consequently, the demurrers will have to be allowed.

Supposing the allegations in the bill to contain the truth, I think it very clear, from the face of it, that there was fraud on the part of the assignees in making the contract of sale with John Sandford, as well as in carrying it into effect; and, for all the purposes of the present argument, I am, of course, bound to take these allegations as true.

The alleged fraud, in the first place, consists in the assignees representing their title as valid and indisputable: knowing it to be defective and liable to litigation; while the refu-

sal to give a deed with covenants of title and warranty, after they had induced Mr. Sandford to become the purchaser, to take possession and commence building, upon the promise of such a deed, was a breach of good faith. And, moreover, the species of coercion made use of to induce him to accept the instrument (without covenants) cannot be deemed otherwise than fraudulent.

If the injury which resulted to Mr. Dickey, the subsequent grantee, had fallen upon Mr. Sandford and he had exhibited a bill in this court for relief, there would be no doubt of his right to a return of the purchase money—at least, of so much of it as would remunerate him for any expenditure in obtaining a perfect title—even though the deed contained no covenants which rendered the grantors liable at law. It is a well-settled rule of this court that a grantee, to whom possession has been delivered under covenants of title and warranty, can have no relief in equity against his grantor for a return of purchase money or security on account of a defect or failure of title: because he has taken care to secure himself by covenants and, if evicted, can have an adequate remedy at law. If he has taken no covenants, and the title fails, he will be without a remedy in this court, as well as at law, provided the contract were fair and there be no fraud in the case. But, if fraud is shown, either in making the contract of sale or in executing it, and whether there be covenants inserted in the deed to secure the title or not, the purchaser, in case of eviction or disturbance of his possession or whenever it is ascertained that the title is defective, may come into this court to be relieved from his purchase or to obtain indemnity against the consequences of the fraud.

Imposition and fraud upon the purchaser by any wilful misrepresentation or concealment, takes the case out of the general rule and entitles him to be redressed in equity, in addition to and beyond the covenants in the deed. The cases of *Bumpus v. Platner*, 1. J. C. R. 213., *Abbot v. Allen*, 2. Ib. 519., *Johnson v. Geer*, Ib. 546., *Chesterman v. Gardner*, 5. Ib. 29., and *Gouverneur v. Elmendorf*, Ib. 79. are authorities upon these points. And see also in *Legge v. Croker*, 1. Ball & B. 514.

But the difficulty in the present case is this: Sandford is

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not the party complaining of the fraud ; nor, indeed, has he been injured by it. Before any eviction or even claim was made under an adverse title, Mr. Sandford sold and conveyed the property to Mr. Dickey for an adequate consideration and without any fraud on his part ; and it does not appear that he entered into covenants of seizin or warranty. So, he is not liable over to his grantee or to the assigns of such grantee. Yet it appears to me there are equitable circumstances arising from some of the statements of the bill which may entitle Mr. Dickey and the complainants, as trustees under him, to stand in the place of Sandford and claim the rights and remedies to a certain extent which he would have been entitled to in case he had remained in possession and the judgment in ejectment has been rendered against him. I allude to the part of the bill which states the giving of the mortgage for four thousand dollars of the purchase money as an inducement to Sandford to accept the deed. The assignees proposed to take the mortgage payable at the expiration of five years and expressly agreed to hold the same and not claim payment until the title should be established or made perfectly satisfactory to Mr. Sandford or his assigns ; and on delivery of the mortgage, Mowatt, one of the assignees, further stipulated to return the purchase money in case the title of the assignees should fail or be defective from any cause. According to this statement of the transaction, the vendors only became trustees of the consideration money (at least, of the part for which the mortgage was given). They were not to hold it as a payment nor as security for the payment absolutely, but only in the event of their title being made good to the purchaser and his assigns. Now, we may lay out of view all intentional fraud ; and looking at the transaction in the above light, the whole will appear to be fair and consistent. The assignees, it is alleged, had been notified and were aware of an adverse claim of title. They had, in the first instance, contracted to sell to the purchaser and to give proper assurances of title, but were advised against the latter ; and, therefore, they proposed the other method of carrying the sale into effect. In this way an implied trust, at least, was created of the purchase money ; and such an one as this court is bound to protect and pre-

serve. Nor could the assignees divest themselves of the trust by assigning the bond and mortgage in the manner stated in the bill. When Dickey purchased of Sandford, the mortgage which the latter had given, instead of being in the hands of the assignees and subject to the trust upon which it had been given, was found to have been assigned contrary thereto. He was also required to pay it off; and it was satisfied out of the money which Mr. Dickey was to give for the property. Upon the assignment of the mortgage, the trust which originally attached to it must be considered as attaching to the money in the hands of the mortgagees and they may be regarded in equity as trustees of it by substitution. If then there be a trust fund and trustees of it: for whose benefit does it enure?

It must be remembered that the mortgage was to be held until the title should be made perfectly satisfactory to Mr. Sandford and his assigns. The nature and object of this arrangement appears to embrace all who might become purchasers under him, through the title which the assignees of the bankrupt's estate undertook to confer. The title failed. A loss resulted; and this has been borne by one who purchased from Sandford upon the faith of the title derived from the assignees, and which the trust was intended to secure. He or those standing in his place and taking his rights, are the persons entitled to the benefit of it.

When we take the allegations in the bill to be true, the present appears to be a case which entitles the complainants to the relief which is sought.

Instances will be found, observes an able writer on equity jurisdiction, to spring from some circumstances attending transactions, as of accident, mistake or fraud, which, in themselves, form grounds of this court's interference, inducing it to imply a trust upon what it ascertains to be the conscientious duty of a party; and, in accordance with its general principles, to compel him to the performance of that which natural justice demands: *Jeremy's Eq. Jur.* 94. There is some reason, at least, for supposing the present to be one of the cases falling within this salutary principle. And as I cannot do more, so I think I cannot do less than overrule the demurrers.

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A distinction has been attempted to be made, upon the argument, between the original surviving assignee and the two assignees since then associated with him. It is said, that if the bill is properly filed against the former on the ground of fraud, yet it is not so as respects the latter, and their demurrer should be allowed. But, if I am correct in supposing the bill may be sustained upon the ground of a trust, then the circumstance of all the assignees being considered trustees of the fund sought to be reached, rendered them all proper parties to the suit.

Another point was raised upon the argument: that if there ever were a cause of action, it was barred by lapse of time. I cannot listen to this objection upon a demurrer: especially as the bill shows that the commissioners in bankruptcy have directed the assignees to retain a sum of money, in order to satisfy this claim, should it be supported in a court of equity. Besides, if the statute of limitations or the staleness of the demand affords any ground of a defence in a case like the present, I think it should be put forward by a plea or be set up in an answer: and not through a demurrer.

The last objection which I have to examine is this: that it belongs to the commissioners and the district court of the United States, under the authority of the bankrupt law itself, to decide upon this claim; and that the court of Chancery has not jurisdiction. I think it is a sufficient answer to say, it is not a debt claimed to be due or owing from the bankrupt or to be paid out of his estate *pro rata* with the creditors, but a remedy sought against the assignees in relation to a sum of money which has found its way into their hands, and not belonging to the bankrupt—that it is a trust-fund to which the complainants are equitably entitled, and over which (as well as over those assignees as being trustees) this court has a concurrent, if not an exclusive jurisdiction. Indeed, the bill states that the commissioners entertained doubts of their powers; and referred the parties to a court of equity or other competent tribunal; and I must presume this was done on account of the claims partaking of the nature of a trust and was not a debt or demand against the bankrupt.

I must overrule the demurrers, with costs.

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PHYFE v. WARDELL and another.

Where circumstances denote fraud in omitting to reduce a part of an agreement into writing, the whole of it is open to parol proof. The Court disregards the writing and treats the whole transaction as a verbal contract.

Bill filed by the lessee of premises, which he held under a church lease, against persons who had agreed in writing to purchase his lease. Complainant alleged that an implied right of renewal entered into the purchase, and that defendants were to take, subject to a burden upon a part of the premises of a lease for a year which had been granted by the complainant. The buyers omitted to insert these things in the written agreement, but verbally recognized them; and they managed to get a renewal in their own names, through the recommendation of the complainant; but declined, inasmuch as the old term had in the mean time expired, to make good their agreement with the latter, and proceeded to eject the tenant who was to have held possession of a part for a year. Complainant prayed that the parties might pay their purchase money and perform their contract with him. A general demurrer was interposed: but overruled.

Bill by Duncan Phyfe, the lessor of certain real estate, April 11th. 1833.
against Charles Wardell and Britain L. Woolley, as purchasers, in order to compel payment of purchase money and obtain specific performance of a contract. It stated, that the complainant was possessed of a leasehold interest in a lot of ground in Vesey street, city of New York, under lease from the officers of St. Michael's church for a term of years, and which would expire on the twenty-fifth day of March, one thousand eight hundred and thirty-two; and became vested in the complainant through diverse mesne assignments. That on the first day of February, one thousand eight hundred and thirty-two, he entered into an agreement with one Decker, to underlet to him part of the premises for a year, from the first day of May following; but was ignorant at the time that the original lease would expire on the said twenty-fifth day of March. The bill also set forth, that about the fifteenth day of February, one thousand eight hundred and thirty-two, the defendants applied to the complainant to purchase the unexpired term, with the right and privilege which

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he, as the holder of the lease, had to a renewal of it; and they represented their having bought leases, covering adjoining lots, and their desire of improving the whole of the property. He, at first, declined negotiating with them; but they subsequently made repeated applications and offered to purchase the remainder of the term, subject to Decker's lease for a year, and assume the complainant's responsibility to him—stating their object to be, to get possession of the lot for purposes of improvement and because they could then put up buildings, which they wished to erect upon the premises and on adjoining lots, at one and the same time. The bill charged it to have always been a custom for St. Michael's Church to grant renewals of leases to persons possessed of leases which were about to expire, in preference to giving them to strangers: and that such privilege of renewal formed a valuable part of the leases and always entered into the consideration of sale and transfer, and to obtain the privilege of renewal was the primary object which the defendants had in view in proposing to purchase the unexpired term, and it was their intention immediately to procure a new lease of the lot, remove the old buildings and make new and expensive improvements—the latter of which, indeed, they were doing. That after much solicitation and on the ninth day of March, one thousand eight hundred and thirty-two, the complainant consented and agreed to sell and assign his unexpired term and right of renewal in the premises to the defendants, for the price of two thousand six hundred and fifty dollars: subject however to the lease for a year granted to Decker. A memorandum in writing was then signed and exchanged between the parties. The one signed by the defendants was in these words; "We agree to purchase of D. Phyfe, for the consideration of two thousand six hundred and fifty dollars, the lease of the lot No. 38 Vesey street, with the buildings thereon, to be paid for in the first week in May next, when possession and a title is to be given for the same. March 9, 1832." The bill then alleged, that, upon receiving this writing the complainant objected to it: because his right to renewal and the defendants' engagement to assume the responsibility to Decker were not mentioned. Also, that they thereupon replied, those points were

admitted and well understood and no advantage would be taken by them of the omission; and the complainant thereupon rested satisfied. It further alleged, that neither party had then examined the lease or knew the period of its expiration, nor was it considered material, as the defendants had previously determined, in case they purchased, to procure a renewal immediately: but the agreement was made upon the express understanding that the unexpired term was sold and purchased, whatever it might, upon examination, prove to be. That shortly afterwards, the complainant was informed by the agent of the Church, of the lease having expired; and an offer of renewal was made to him; and he then informed the agent of his having sold to the defendants and that the Church might agree with and make the new lease directly to them—and to all of which they assented and the defendants well knew he gave those directions in the full confidence of their performing their part of the contract of purchase. And that, in pursuance of such directions, a new lease was made to them by the Church on the first day of May, one thousand eight hundred and thirty-two, for the term of twenty-one years. The bill charged, that if such directions had not been given, a new lease would have been granted to the complainant in his own name. That, after the directions were given to make out the lease in the names of the defendants, but before it was delivered, the complainant discovered, upon conversing with the defendants, that they did not intend to observe the agreement made with them. He, thereupon, notified the agent of the church not to deliver the lease until the defendants should have paid the purchase money and fulfilled their agreement with him; and yet the lease was delivered to them. That the complainant had since requested payment of the two thousand six hundred and fifty dollars, which they had refused; and they had caused Decker, the tenant under the complainant, to be ejected, and had demolished the old buildings and had commenced the erection of new ones upon the lot, and, in consequence of being evicted, Decker claimed damages from the complainant and threatened him with an action at law. The bill prayed a specific performance of the agreement, by the defendants paying to the complainant the sum of two thousand six

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1833. hundred and fifty dollars, as well as such amount as he might
 ~~~~~ be compelled to pay in damages to Decker—or that they  
 FHYFE might be decreed to transfer and assign the renewed lease to  
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A general demurrer was interposed.

Mr. *D. Selden*, in support of the demurrer.

Mr. *J. Duer*, for the complainant.

*June 25th.*      THE VICE-CHANCELLOR.—The bill shows an, apparently, fair contract, binding upon the defendants and virtually fulfilled by the complainant; while enough is stated, to make out a case of fraud against the defendants, in their procuring a new lease under the seeming sanction of the contract and yet attempting to disclaim it and holding the demised property as though it had never been made.

It has been said in argument by the counsel for the defendants, that the church was under no obligation to grant a new lease to any one—they had a right to refuse it to the complainant, and virtually they did do so by delivering a lease to the defendants after notice from him not to deliver it. But the bill states, and, at present, I must be governed by it, that, by the custom of the church, the complainant was entitled to the new lease and the same would have been granted to him and not to the defendants if no agreement for the sale of the privilege or good will, which was a marketable article, had taken place, and also provided no directions for making out the new lease to them had been given by him. This is a matter of fact. It is an averment in the bill, which, uncontradicted, precludes all argument to the contrary. Nor do I understand, how the notice which he gave not to deliver the lease could put an end to the contract and leave the defendants at liberty to make their own contract with the church independent of the complainant. The notice did not amount to any relinquishment of right or privilege in the lease which they were about to take; nor did it show any rescinding of the contract. The object was to secure the payment of the purchase money and a performance, on their parts, of the agreement, by inducing the agent of the church

to withhold the delivery of the lease until they complied; and this was perfectly consistent with the agreement as a subsisting one, and which the complainant meant to enforce. At present I am so bound to regard it.

The question then is, whether this is such an agreement as equity will aid a party in enforcing? There would be no necessity for resorting to this Court, if the only object of the bill were to recover payment of a sum of two thousand six hundred and fifty dollars. A court of law could afford an adequate remedy; and, as a general rule, equity does not interfere to decree a specific performance of contracts, except where the legal remedy is inadequate or defective and where something remains to be done over and above the mere payment of money. But, here is something more. We find it in the shape of an indemnity against any damages which may be claimed by Decker. The defendants made their purchase, subject to this man's right of occupancy for one year; and if they chose to dispossess or prevent him from occupying, then those who have assumed the responsibility are bound, as a matter of common justice, to protect the complainant from the consequences.

An objection is taken, because this part of the agreement is not in writing; and, based upon this objection, it is said the complainant cannot be permitted to allege or give it in evidence: more especially in the presence of a written memorandum which must be supposed to contain the whole of the agreement. The bill sets forth the reason of the omission: it was induced by the representations of the defendants and the complainant confided in them. If they were now permitted to take advantage of the omission and hold the complainant strictly to the written memorandum as the only evidence of the agreement, this court would be sanctioning the commission of a fraud. For the purpose of preventing such a consequence, this court, under the circumstances, is at liberty to disregard the writing and treat the whole transaction as a verbal contract. And, upon the basis of part performance, where possession has been taken or the acts done amount to part performance, it may receive parol proof of the whole agreement, independent of or in connection with what may be in writing, in order to make out the con-

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tract. This principle appears to have been acknowledged by Ch. J. Thompson before the court of Errors, in *Parkhurst v. Van Cortland*, 14. J. R. 33.; and this I think is fairly deducible from what was said by Lord Redesdale in *Watt v. Grove*, 2. Sch. & Lef. 502, namely, that under circumstances (like the present) which denote fraud in omitting to reduce a part of the agreement into writing, the whole is open to parol proof. It is for this reason a court of equity has jurisdiction and that it must, necessarily, exercise more extensive powers in its investigation, when going through the medium of parol evidence, than a court of law can do, which, by its very rules and mode of proceeding, cannot enter into the question of fraud or mistake for the purpose of setting aside or reforming a written contract: *Fullagar v. Clark*, 18. Ves. 483.

Upon the ground of there having been this verbal assurance in relation to Decker's tenancy (and relying upon which the complainant forbore to insist upon its insertion in the written memorandum), with the defendants subsequent refusal to abide by it, the complainant may be entitled, at least, to some portion of the relief which he seeks in this court: *Chamberlain v. Agar*, 2. V. & B. 262.; and, as the bill is good for one purpose, a general demurrer to the whole of it cannot be sustained.

The demurrer must be overruled, with costs.

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VALENTINE v. FARRINGTON and others.

Where a party is attempted to be fixed as a principal in a money bond and the defence is that he was a surety only and had required the obligee to sue the other party as principal and such obligee had neglected to do so: this is new matter, and, when put in issue, must be made out distinctly and beyond all reasonable doubt. A full and explicit notice or request from the surety to the creditor to proceed without delay to collect the amount from the principal debtor, must be proved; and, in order to exonerate the surety, it must also appear that the creditor has improperly refused or neglected to do so, and, by such refusal or neglect, the means of recovering the debt of the principal have been lost by intervening insolvency or from some other cause.

A bill by a bond creditor, upon a joint and several bond, will be sustained against the heirs and devisees of a deceased obligor, although filed before the legal remedy has been exhausted against the surviving obligor. It is only necessary to make the latter a party.

Although an action is brought by a creditor of a testator against the executors, which proceeds only to a plea, and then the creditor files a bill on behalf of himself and others, to account, and makes the executors and devisees parties, who answer, no valid objection to a decree arises on the ground of the action pending at law: because the executors can be no longer vexed by the latter.

This was a bill by a bond creditor against the devisees of *April 19th.*  
a deceased obligor, for an account and payment and satisfaction out of real estate. 1833.

The bond had been given on the sixth day of May, one thousand eight hundred and seventeen, by Jonas Farrington (deceased) and George Farrington, junior, to the complainant, conditioned to pay one thousand dollars, with interest. The obligors bound themselves, their heirs, executors and administrators, jointly and severally, for payment of the money.

In the month of September, one thousand eight hundred and twenty-two, the said Jonas Farrington made his will; and thereby devised his estate, real and personal, to his children and grand-children, who were defendants in the cause, and he appointed them executors thereof. He afterwards died; the will was proved; and letters testamentary were granted to two of his sons. During the year one thousand eight hundred and twenty-four, the complainant commenced

1833. a suit at law against the executors upon the bond. They pleaded *plene administravit* before notice of the bond. No further proceedings appear to have been had at law.

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In the month of April, one thousand eight hundred and thirty, the complainant filed her bill, on behalf of herself and all other creditors of the testator, asking for an account from the executors of the personal estate and to have the same applied in a due course of administration, and praying also a discovery of the situation and value of the real estate and to have the same sold for the purpose of paying debts, &c. The answers admitted the making of the bond and, generally, all the other allegations in the bill; but it set up, by way of avoidance or defence, that the bond was given for money borrowed of the complainant by the surviving obligor, George Farrington, junior, and the testator joined in the bond as a surety; also, that after his death, the complainant was requested to take measures for compelling the principal debtor to pay the money, he being at the time possessed of property and well able, and yet the complainant refused or neglected to call upon him for payment and omitted so to do until he became insolvent; and that the loss of the money, by his insolvency, was owing to the negligence, in this respect, of the complainant, who, therefore, ought to bear the loss, she well knowing the testator was security only and not the principal debtor. In order to uphold this defence, several witnesses had been examined; and some counter-testimony also taken. It was difficult to say, from the defendants' evidence, whether the testator was merely a surety in the bond or the borrower himself, and, therefore, the principal debtor; at any rate the point was left in doubt. The subscribing witness to the bond, who was examined on the part of the defendants, testified, that he was present when the money was loaned for which the bond was given and the application for it was made through him, in the first instance, by Charles Farrington, and George Farrington junior, they proposing to give their father, the testator, as security, and the complainant consented to let them have the money upon his security; that, afterwards, George came for the money and stated that Charles had declined being a party, and he, George, and the father had concluded to take the

money, and the bond was accordingly made and the witness handed over the amount, which had been left with him by the complainant, that is to say, to George the sum of two hundred dollars, and to the father, the testator, a certificate of a deposit in bank for eight hundred dollars. How the money obtained upon the certificate was applied, did not appear, but it was in evidence that the son George had requested the bond might remain with the person through whom the loan was obtained, for the convenience of himself in calling to pay the interest, and also, that he had paid the interest for several years in succession.

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The son George, who was made a defendant, had suffered the bill to be taken as confessed.

*Mr. W. N. Dyckman*, for the complainant.

*Mr. R. Bogardus*, for the defendants.

*July 22nd.*

**THE VICE-CHANCELLOR:**—The defence set up by the answer, as to the debt being the son's and the want of diligence in collecting the amount of it after a request had been made, is new matter; and, on account of issue being taken upon it, the defendants are bound to make out the same by proof. The application of the money does not sufficiently appear. The son George is, perhaps, the only person who could explain it; and yet, although he has allowed the bill to be taken as confessed against him and might have been examined as a witness, he has not been. In the absence of his testimony and upon the evidence before me, the inference is as strong, if not stronger, that the father and son were joint borrowers and both principals in the bond, as that George was principal and his father a surety merely. But, the evidence is not conclusive of the father's being any more than a surety.

In order to entitle the defendants to the rule of law upon which such a defence is founded, they are bound to make out the fact of suretyship affirmatively and beyond all reasonable doubt. This they have not done.

Nor have they been more successful upon the other points which it was necessary for them to have proved.

The principle to be gathered from the cases of *Pain v.*

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 Ib. 384. requires a full and explicit notice or request from the surety to the creditor to proceed without delay to collect the amount from the principal debtor; and, in order to exonerate the surety, it must also appear that the creditor has improperly refused or neglected to do so and, by such refusal or neglect, the means of recovering the debt of the principal have been lost by intervening insolvency or from some other cause.

The testimony before me (even if the leading fact were established) falls short of proving the requisite notice or request to the complainant to proceed against George Farrington or of improper delay; and it is still more difficult to gather from the testimony that George Farrington was, at the time of the alleged request, able to pay the debt or that the loss (if such it be) to the estate of the deceased obligor, in consequence of the present insolvency of the surviving obligor, is the result of or in any degree attributable to a remissness on the part of the complainant.

There are one or two objections which were made at the hearing and not raised by the answer. If they would hold, they might have been raised by a demurrer. I will now notice them. The first is, that a bill in behalf of a bond creditor ought not to be supported in this court against the heirs or devisees of a deceased obligor, especially if he were a surety, until the legal remedy has been exhausted against the surviving obligor. This objection is clearly not well taken.

The bond is joint and several; and, according to the latest authorities, it is only necessary to make the surviving obligor a party to the suit: *Haywood v. Ovey*, 6. Mad. C. R. 113.; *Bland v. Winter*, 1. S. & S. 246.; and see, *Edwards on Parties*, 99. to 102. The other objection is: the suit against the personal representatives ought to have been prosecuted to judgment or discontinued before filing a bill here. I think this is sufficiently met by the fact of the executors being parties to this suit, both as executors and devisees; and, because, from having been brought here for the purposes of accounting, they can be vexed no further in the suit at law by the same creditor(a)—and besides, they show, as execu-

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(a) Nor by other creditors: *Clarke v. The Earl of Ormonde*, 1. Jacob's Rep. 122, 123, 124.

tors, they have fully administered and have no assets arising from the personal estate for which they can be made further liable.

I must declare the bond a subsisting debt against the estate of the testator, Jonas Farrington; and direct the usual reference to take accounts and for sale of the real estate.

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CAROW, executor of JOHN MOWATT v. MOWATT, administratrix of JOHN E. MOWATT, and others.

Whenever the right of administration devolves upon an infant, the proper course is, to grant administration to his guardian or some other person *durante minore etate*. If, through mistake or inadvertence, the office has been conferred upon an infant, it may be revoked by the surrogate.

An infant administrator is responsible for all acts done after coming of age and before revocation. A court of equity regards him as a trustee and compels him so far to account: but not with respect to assets which came to his hands during infancy.

There is not the same strictness or difficulty in suing here upon administration bonds as at law; nor do the same rules apply.

Notwithstanding the R. S., chancery has power to inquire into any alleged *devastavit* by an executor or administrator and to bring all persons before it who may be interested in the question.

A court of equity will no more subject a surety in an administration bond before a *devastavit* is proved, than a court of law.

Where an administrator, committing a *devastavit*, is dead, equity will, before action establishing it, take cognizance of a suit against his sureties or their representatives, and the persons interested in any estate which he may have left, and make them liable for waste or misapplication of assets. But this would not be done in an ordinary case where the administrator is in full life and within the reach of a court of law or the surrogate's court.

A creditor holding a specialty debt due from an intestate and coming against the estate of his administrator, on account of a *devastavit*, can only take equally with such administrator's simple contract creditors; while his sureties must make up the balance.

J. E. M. died intestate and indebted to the complainant's testator in a money bond. J. E. M. administered on the effects of E. M., gave the usual bond, with sureties, in the surrogate's office; and committed a *devastavit*. J. E. M. died; and a bill was filed by the complainant's testator against the administratrix of J. E. M., one of the sureties and the administratrix of the other sureties, for the purpose of fixing them on the ground of this *devastavit*. The bill was *HELD* to be, as to parties, well filed; and also, that the complainant would have to come in amongst the simple contract creditors of J. E. M., and the sureties make up the balance.

April 19th.  
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In the month of January, one thousand eight hundred and twenty eight, Elias Mowatt died intestate and indebted to the complainant's testator in the sum of fifteen hundred dol-  
*Infant. Administrator. Devastavit. Surety.*

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lars, which had been secured by a bond bearing date the first day of May one thousand eight hundred and twenty-three.

John E. Mowatt administered upon the estate of Elias Mowatt, under letters of administration granted to him by the Surrogate of the city and county of New York on the seventeenth day of January, one thousand eight hundred and twenty-eight. At the time of taking out such letters, he gave the bond required by statute, with Benjamin A. Waldron and James Mowatt as his sureties.

On the fourth day of January, one thousand eight hundred and twenty-nine, John E. Mowatt died intestate, having possessed himself of the personal estate of Elias Mowatt: but without filing an inventory or having paid any debts or accounted for property.

Martha Mowatt, his widow, was appointed administratrix of his estate in the month of March, one thousand eight hundred and twenty-nine. At this time she was a minor—not being twenty-one years of age until the month of June, one thousand eight hundred and twenty-nine.

In the month of March, one thousand eight hundred and thirty, the complainant filed his bill against the said Martha Mowatt, as administratrix of her deceased husband, John E. Mowatt, and also against his sureties. The object of the bill was to establish a *devastavit* by John E. Mowatt, of the property which came to his hands as administrator of Elias Mowatt, and to reach the assets of the former, in order to make good such *devastavit*, and, so that the bond debt might have a preference over simple contract creditors; and also, in case of a deficiency of his estate, to compel the sureties to contribute.

No question was made as to the bond being a subsisting debt against the estate of Elias Mowatt, the obligor. It was admitted that the other debts which he owed were simple contract debts.

By the answer of the defendant, Martha Mowatt, it appeared that the personal estate of Elias Mowatt, which came to the hands of John E. Mowatt, in his capacity of administrator, amounted to about thirteen hundred and eighty dollars; and that the amount of her husband John E. Mowatt's estate which came into her possession, as near as she could as-

certain, was about two thousand dollars. She stated he died insolvent. Also, that when she took out letters of administration, it was not suggested, nor did it occur to her that she was incompetent to take the office of administratrix by reason of infancy, nor was the Surrogate acquainted with the circumstance of her being under age. She submitted, she was not competent by law to accept of the office and could not bind herself in the bond required by law as administratrix; and being an infant, was not chargeable with waste—should the effects of her husband have been wasted. She also insisted upon the Surrogate's having no authority to grant letters of administration to her while she was an infant; and, consequently, that the letters to her, purporting to be letters of administration, were void in law, and she was not and had not been administratrix.

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The answers of the defendants, Anna Maria Waldron, as administratrix of Benjamin A. Waldron, and James Mowatt, insisted that the sureties ought not to be impleaded in this court, because, if there were any liability, the remedy was at law.

After these answers had been put in, the Surrogate of the city and county of New York repealed the letters of administration which had been thus granted to her, and appointed Silvanus Miller, Esquire, administrator in the place of Martha Mowatt.

The latter then filed her cross-bill in the nature of a supplemental bill, setting forth the anterior proceedings, bringing in Mr. Miller as a party, and stating that the latter had taken possession of the articles of personal property which remained of John E. Mowatt's estate, and claimed the funds in her hands. This bill prayed that the letters of administration granted to her might be declared to have been originally null and void, or, if valid, adjudged to have been revoked and administration duly granted to Mr. Miller; and that Miller, as administrator, and the complainant, Carow, might interplead in respect to the sum of four hundred and forty-four dollars remaining in her hands and she be allowed to pay over the same to one or the other of them or be at liberty to bring the same into court and she be discharged from all further liability.



1833. The answer of Isaac Carow to this bill insisted upon her being still accountable as administratrix; and denied the Surrogate's right to revoke the letters which he had granted to Martha Mowatt.

**CAROW**  
**v.**  
**MOWATT.**

Mr. *J. Anthon*, for Isaac Carow.

Mr. *C. G. Troup*, for the defendant, Martha Mowatt.

Mr. *C. V. S. Kane*, for James Mowatt.

Mr. *Mulock*, for Waldron's administratrix.

*Septem. 9th.* THE VICE-CHANCELLOR:—This case divides itself into two distinct branches: the one as to whether Martha Mowatt is still to be regarded as administratrix of her late husband and accountable for the property which came to his hands as the administrator of Elias Mowatt; and the other, as to the sureties and their liability in a court of equity.

1. By statute, although not at common law, the executors and administrators of an executor or administrator are liable for a *devastavit* or misapplication of assets by the first executor or administrator. The latter becomes personally responsible for any waste or conversion of the property to his own use and the claim for it may be pursued against his representative in a court of equity. Hence, the original bill was properly filed against Martha Mowatt: she being, at the time, of age, holding the office of administratrix and acting therein. On account of the incompetency of infants to bind themselves by bond or to render themselves liable to account for property which may come to their hands during minority, they cannot lawfully be appointed to fill the office of administrator. Whenever the right to administration devolves upon an infant, the proper course is, to grant administration to his guardian or to some other person *durante minore etate*. If, through mistake or inadvertence, the appointment has been conferred upon an infant, it may be revoked by the surrogate: *Abbott v. Abbott*, 2. Phillim. R. 578. But, for all acts done by such person as administrator (in respect to the property of the intestate) after he comes of age and before the revo-

ation, he certainly must be responsible. The appointment may from personal disability have been irregular and void: but after such disability is removed, if he will continue to hold the office and act in the trust, a court of equity, regarding him as a trustee, will compel him to account for his receipts after the time of arriving at full age—although no account will be directed in respect to the assets which came to his hands during infancy: *Hindmarsh v. Southgate*, 3. Russ. 324. I do not, however, understand Mrs. Mowatt as claiming exemption merely on account of any act of her administration during minority, and which was only for about the space of three months. She claims to be discharged from the whole: declaring she has given up or is ready to give up and pay over all the property and effects of her husband which came to her hands. Upon complying with this condition there can be no difficulty in making a decree which shall completely exonerate her from all further liability—holding Mr. Miller, the substituted administrator, and who is now before the court, as the proper accounting party: *Parker v. Dee*, Finch's R. 123.

Although Mrs. Mowatt has not regularly accounted before the surrogate to the new administrator, yet, from the statement in her answer relative to the property which has come to her hands, it seems unnecessary to refer the matter to a master. The amount is not disputed. Upon payment of the money to Mr. Miller, she can be discharged and dismissed altogether from this suit. As to her claim for costs: I cannot allow her them in the suit where she has filed the cross or supplemental bill. This was done for her own convenience. Even if it were necessary as connected with her rights, still she brought the necessity of it upon herself, by continuing to hold the office of administratrix until the bill in the original suit was exhibited against her. She should either have divested herself of the character earlier and before the necessity of a bill for the purpose arose or have held on and not raised the objection to the validity of her own appointment. In either case the costs would have been avoided. She must bear her own costs of this suit: *Badeau v. Rogers*, 2. Paige 209. The utmost I can do is to exempt her personally from the payment of the defendant's

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costs. As to her defence in the original suit: she is to be viewed as standing in the situation of an administratrix ready to account, and without any misbehaviour on her part—for none appears—and she is entitled to have her costs paid out of the assets. This will be agreeable to the general rule: *Beames on Costs*, 77.; *Williams on Executors*, 1252.

2. The other branch of this case is, perhaps, more important, since it involves not only a question of jurisdiction, but also a rule of practice in relation to sureties in administration bonds which is not clearly settled.

The form of the bond prescribed by our statute, and the provisions connected with it, are taken from the 22. and 23. Car. II. ch. 10., called, the statute of distributions. By the latter, the bond is taken in the name of the ordinary who grants the administration; and it remains with him. Here, it is made to the people of the State of New York, and is held by the surrogate; and in addition to the English words that the bond shall be valid and pleadable in any court of justice, our statute goes on to say, "in case the bond shall become forfeited, it shall be lawful for the surrogate who granted the administration to cause the same to be prosecuted in any court of record, at the request of any party grieved by such forfeiture; and the monies recovered upon such bond shall be applied towards making good the damages sustained by the not performing the condition, in such manner as the surrogate shall, by his sentence or decree, direct." No such express direction is contained in the English statute; and it may be considered a superfluous provision in ours: since, without it the courts have held it to be the right of a creditor (as well as of the distributee) *ex debito justitiæ* to sue in the courts of law upon an administration bond in the name of the ordinary—although a distinction was once taken between a next of kin and a creditor as to the right of suing upon such a bond: *Greenside v. Benson*, 3. Atk. 248.; *Archbishop of Canterbury v. House*, Cowp. 140. S. C. Lofft, 622. In proceeding directly at law upon these bonds in an action of debt, the great difficulty is to ascertain how far the condition has been broken and to furnish the proper evidence of a *devastavit*, so as to enable the plaintiff to maintain the action. The forms of pleading in an action of

debt upon such a bond and the mode of proceeding in courts of law, do not admit of all the collateral inquiries which are necessary to ascertain precisely the right of the plaintiff and determine the liability of the sureties. This liability may be termed an ultimate one: for, the claim of the creditor or next of kin must first be established against the administrator and his default in not satisfying the demand be shown—in other words, that he has wasted or misapplied the assets. For the purpose of evidence on these points, it is necessary to call the administrator to an account and obtain either a sentence, decree or judgment against him. If a judgment is recovered and an execution returned unsatisfied, then would come an action upon the judgment suggesting a *devastavit*, or some other of the modes of proceeding which the practice of the common law courts points out for obtaining satisfaction. And should it prove unavailing, there would be evidence, by matter of record, to show, *prima facie*, at least, the administration bond forfeited and to entitle the plaintiff to sue upon it at law. So, if the administrator be called to account before the surrogate (as he may be) and found in default, and a *devastavit* be formally and clearly established, this will be sufficient and the bond will be ordered to be put in suit at law against the sureties. The statute runs to this effect; and the course pursued by the Ecclesiastical Courts is the same: *Devey v. Edwards*, 3. Addams, E. R. 68. Courts of law appear to be strict in requiring some one of these procedures as a pre-requisite to the maintenance of a suit upon the administration bond. I need only refer to some of the most prominent cases: *Jones v. Anderson*, 4. McCord's R. 113.; *Stewart v. Treasurer of Champaign County*, 4. Hammond's Ohio R. 98.; *Gordon v. Justices of Frederick*, 1. Munford, 1.; *Inglehart v. Stake*, 2. Gill & Johnson, 235.; *Correy v. Williams*, 9. Mass. R. 114.

*The People v. Dunlap*, 13. J. R. 437., may, perhaps, be considered as relaxing, in some measure, the rule which other American decisions profess to establish. But, however this may be, and even admitting the necessity of a rigid adherence to the rule in courts of law, grounded upon their inability to try all the questions which might become necessary to make out a case of *devastavit* in an action upon the adminis-

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tration bond, yet the same difficulty does not exist in a court of equity, nor do the same rules apply. Chancery has a general jurisdiction over executors and administrators in relation to the administration of estates. It regards such persons as trustees; and, upon this ground exercises a power over them in the same manner as over trustees of express trusts, and will compel them to discover and set forth an account of the assets and show how they have been applied. It will also see the implied trust duly executed. In these respects, the jurisdiction might be considered as, in a great degree, concurrent with the law and surrogates courts. (I speak now of the law as it stood anterior to the revision: for it was under the old statute that the administration bond in question was given and the *devastavit* committed). But the remedies in such courts were not sufficiently ample. A court of chancery, upon a bill filed by or in behalf of creditors, next of kin or legatees against an executor or administrator, will direct a general account of the estate and debts, and decree payment and distribution in the regular course of administration; and therefore it has been observed, that the relief afforded here, from being founded upon the relative rights of all the parties in interest, is more comprehensive than could be given in other courts: Jeremy's Eq. Jur. 537, 538. Under our present system, a surrogate possesses more enlarged powers than formerly: but I am not aware of any thing which lessens the jurisdiction of this court. In the exercise of its powers, there is certainly a competency of enquiring into any alleged *devastavit* by an executor or administrator and also the right to bring all persons before it who may be interested in the question. The forms of proceeding and the practice of the court are well adapted to the purposes of such an enquiry; and, while a decree can be made to reach the property and persons of all who may be liable, the relative equities of such parties will be adjusted and enforced. I am not aware of any instance in our own particular court or among the reported decisions of English Chancery, of a bill being filed against the principal and sureties in an administration bond where a *devastavit* is charged, and where it was sought to make the sureties liable. Still, we are not without a precedent of the kind in this country. In Virgi-

nia, the practice of filing such bills in special cases is well established. *Bachelder v. Elliott's Administrators*, 1. Hen. & Munf. 10. was a case of a bill in chancery by a simple contract creditor against the administrator and his sureties. Although the court did not entertain the bill, and held, as a general rule, that the sureties of an executor or administrator could not be sued in equity, any more than at law, until a *devastavit* was fixed upon the principal in a previous suit against him, yet, it said that in special cases where, from some necessity, a creditor was obliged to come into a court of equity, in the first instance, against the principal, it would be proper, in order to prevent circuity of action, to make the sureties parties in the suit. And, in *Clark v. Webb*, 2. Hen. & Munf. 8. the same court held, that the sureties of an executor and all other persons concerned in interest against whom a decree could be rendered, ought to be made defendants, with the executor, in a bill filed for a discovery of the assets after a judgment against him and a return of an execution *de bonis testatoris* unsatisfied. But, the case most analogous to the present and in which the question I am considering was more deliberately examined and adjudicated upon (in the Supreme Court of Appeals, Virginia,) is *Spottiswood v. Dandridge*, 4. Munf. 289. There, a bill in chancery was filed in favor of legatees against the personal representatives of a deceased executor and the sureties and representatives of deceased sureties of such executor, seeking a discovery of assets and calling for a settlement of the accounts of the deceased executor, charging a variety of acts of mal-administration and that he had died insolvent; and claiming to subject the defendants to the payment of whatever should appear to be due. The defendants demurred to the bill, on the ground of its going for a *devastavit*, the remedy for which, if any, was at law and not in equity. It was overruled by the unanimous opinion of the court. After noticing the form and condition of the bond required from an executor as well as an administrator by the laws of Virginia (and which bond, by the bye, is the same as the one required of an administrator under our law—as well as under the English statute, although taken in the name of the sitting justice or ordinary) and after pointing out its legal effect and

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adverting to the difficulty in the courts of law of establishing a *devastavit* in a suit upon the bond against the sureties, which is owing to their forms of proceeding, the learned judge who pronounced the opinion of the court, observed: "But widely different is the mode of proceeding in a court of equity. Wherever a case occurs, over which it has jurisdiction, it may, at once, convene all the parties concerned in interest; and pending the same suit and by a proceeding forming a part thereof, may ascertain the fact, whether a *devastavit* has been committed or not, and if it shall appear by that procedure that a *devastavit* has been committed, then, and not before, will it subject the sureties, although they have all along been held in court, for their own benefit, to attend to investigations in which they are so materially interested. There is however, no difference in this respect, between courts of law and courts of equity, except in the forms of their proceeding, and the ability thereby afforded to courts of equity to give relief in some cases where courts of law could not. In deciding the rights of the parties, they proceed upon principles common to both courts: for a court of equity will no more subject a surety, before a *devastavit* is established, than a court of law." For these reasons, they were clearly of opinion that a court of equity might, at the suit of a legatee and without any previous suit having been brought against the executor to convict him of a *devastavit*, convene the sureties or their representatives and the persons interested in any estate which the executor may have left and make them liable for any waste or misapplication of the assets which should be established in the progress of the suit.

I am so well satisfied with the views there expressed and the course of reasoning adopted on the subject, that, if not bound to acknowledge the case as an authority, I am content to use it as a precedent. The circumstance of there being no person legally representing the deceased executor against whom a suit at law could be brought in order to determine the matter of a *devastavit* appears to have had some weight with the court in its deciding that chancery will take cognizance of the question in the first instance. A similar difficulty, although, perhaps, not an insuperable one, would be found to exist in the present case as to fixing a *devastavit*

upon John E. Mowatt, the first administrator, through the medium of a suit at law against his personal representative; and the rule may, with propriety, be applied here, that where the remedy at law is difficult and doubtful, equity will lend its aid. When an executor or administrator is in full life and within the reach of a court of law or a citation from the surrogate, especially under the enlarged jurisdiction which he now possesses, it can hardly become necessary for a creditor, legatee or next of kin to resort to chancery in the first instance for the purpose of ascertaining a *devastavit*, and, at the same time, to make the sureties in an administration bond parties to the suit with a view to fix them. I do not mean to say that, in a plain case of this sort, a court of equity will entertain a bill against the sureties. What I mean is, that under special circumstances like the present, I think they may be brought before the court, in order to have their liability ascertained and payment compelled—so far as it may be necessary to make good the *devastavit* of their principal. I am aware of several decisions of the chancellors of South Carolina which appear to be at variance with those of Virginia and with the conclusion I have formed. So far as their opinions are reported, the point does not appear to have been much considered; and, indeed, it arose in cases where there was a complete remedy at law—nor were there any particular circumstances which rendered a bill in chancery against them in any way necessary. These cases are, *The Executors of Bague v. Blacklock*, 2. Dessau. 602.; *Hoell and wife v. Blanchard*, 4. Ib. 21.; *Glenn v. Conner*, Harper's Ch. R. 267. The decision in this last case, as reported, seems irreconcilable with the one immediately before it in the same volume: *Maywood v. Butler*, page 265. But, at any rate, I am convinced there is enough in the circumstances of the present case to take it out of the general rule which those decisions would appear to establish. Upon the whole, I must decide this bill proper as to all the parties who are made defendants.

Then, as to particular directions in the decree. The complainant was a specialty creditor of Elias Mowatt, and, as such, entitled to a preference over simple contract creditors in the assets which were in the hands of John E. Mowatt,

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his administrator. The amount of the bond due to the complainant's intestate would more than have absorbed the whole of such assets. Instead of applying the proceeds (thirteen hundred and eighty dollars) in this way, the administrator mingled the money with his own or used it in his business in such a way as not to be traced or identified. He thus became the debtor and personally responsible; and it is now payable out of his assets in the hands of his administrator. Still, as respects him and his estate, it is only a simple contract debt: *Ram on Assets*, 500.; *Charlton v. Low*, 3. P. Wms. 330, 331. If there should be a deficiency of assets to satisfy all the debts, this one can only be paid with others of the same class and in the order of administration; and the defendants, Waldron and James Mowatt, will be liable for the balance which may be wanted to make up the amount of assets wasted or misapplied. A reference must be had to take the accounts upon these principles, which will ascertain the actual amount of the *devastavit*; and upon the coming in and confirmation of the report, a proper decree can be made—until then, all further directions are reserved. The order now to be entered may, nevertheless, embrace the discharge of Martha Mowatt and all matters relating to her.

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v.  
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KOHLER and others v. KOHLER and others.

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Where a decree is had in a partition suit wherein an infant (amongst others) has been made a defendant, but no guardian ad litem has been appointed, nor order entered for appearance, nor bill taken as confessed against him, a purchaser under the decree will be discharged from his bid, even though this defendant may have since attained his majority and offers to release his interest: the decree being so far irregular as to be incapable of enforcement.

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The bill had been filed for a partition or sale; and the estate was sold under a decretal order. Philemon H. Frost became the purchaser, but raised objections to the title; and a reference was had to a master to look into and examine the objections. One of them was: that the bill had never been taken as confessed against William F. Kohler, described as an infant in the bill, nor had he appeared or answered.

Mr. *Clarkson*, for the complainants.

Mr. *W. C. Wetmore*, for the purchaser.

THE VICE-CHANCELLOR:—Several objections are raised by the purchaser of the property sold in this suit; but it may be unnecessary to refer to more than one of them. The decree in the cause appears to have been obtained without any proceedings having been taken against the infant defendant, William F. Kohler; no guardian ad litem was appointed, no appearance was in any way entered, nor was the bill taken as confessed against him. The irregularity is attempted to be obviated by an offer of a release of all interest by William F. Kohler, who, it is said, has now come of age. But this is, at present, but a suggestion from counsel; and, indeed, even though the proposition came in a tangible shape, still it comes back to the sufficiency of the decree—as to other parties.

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 HART
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The 187th rule guides the clerk of this court in the enrolment of decrees. He must mention the defendants who have appeared and answered and those who have suffered the bill to be taken as confessed against them, as well as those against whom the same is taken as confessed for want of appearance, distinguishing such as neglected to appear after a personal service of process from those who are proceeded against as absentees. And, amongst other things, all such proceedings in the cause must be recited as may be necessary to a correct understanding of the decree. Now, how can the clerk make up the enrolment of this decree? The officer himself would necessarily find out the error; and it is of such a nature as to allow the decree to be set aside, if impeached for error.

The purchaser, as to many parties, must take his title through the decree; and, consequently, a mere release by William F. Kohler will not make good the enrolment.

The purchaser must be discharged; and he is entitled to his costs. There is no fund in court out of which they can be paid; but the practice is to direct the complainants to pay them in the first instance. Let this be done here; and the parties adverse to the purchaser must adjust the amount amongst themselves.

HART v. BULKLEY, administrator of Wood, deceased.

April 29th.
 1833.

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*Rights of a  
 surviving  
 trustee  
 against the  
 estate of a  
 deceased  
 co-trustee.*

Where a co-trustee mingles the trust funds with his individual monies so as not to be distinguished, and dies, the other trustee (as trustee) cannot file a bill against his administrator to have funds in his hands delivered over; but the surviving trustee must compete *pari passu* with the creditors of the intestate.

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The bill in this case was filed for the purpose of obtaining an amount of money in the hands of an administrator of a trustee, which was claimed by the surviving trustee.

On the thirtieth day of November one thousand eight hundred and twenty-nine, Moses Q. Wood assigned his property to the complainant, Philip Hart, junior, and to Walter R. Wood, since deceased (two of his creditors), in trust to pay his debts. The assignment contained a list of the creditors; and divided the order of payment into two classes. The first class was to be paid in full; and the second class thirty-three and a third per cent.—and there was a covenant to pay so much. The trustees accepted the trust and acted under it. There was an allegation of Walter R. Wood having collected several thousand dollars; and of having, on the first day of January, one thousand eight hundred and thirty, the sum of three thousand and four hundred dollars on hand. He died in the month of March following, intestate. The defendant, John L. Bulkley, was appointed his administrator by the surrogate of New York. The complainant charged that the above amount of trust-fund ought to be paid over to him as the surviving trustee; and prayed an account and payment.

The defendant answered, by admitting the death of Walter R. Wood; and that he was the brother of the debtor Moses Q. Wood, and brother-in-law to the defendant; his administering; the making out, by Moses Q. Wood, of several other assignments, some to the complainant and Walter R. Wood jointly, and others to the latter alone, to cover implications and responsibilities; accounting for the disposition of the assigned property; and detailing many particulars, but resulting in an admission of there being a balance of nine hundred and eighty-four dollars and ninety-one cents, the avails of the trust-property, due from his intestate at the time of death. The defendant set up the insolvency of the estate; that the same would not pay more than thirty or forty cents on the dollar; and insisted upon the defendant's being liable to pay over a rateable proportion to the complainant, and only equal to the other creditors. He stated that the money on hand, at the time of the intestate's death, was only one hundred and forty-one dollars and ninety five cents; that the avails of the trust-property was not kept separate from the other monies of the intestate, but was mingled; and that the balance of nine hundred and eighty-four

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dollars and ninety-one cents appeared as the balance of the general account of the trust-funds which came to the hands of the intestate.

Mr. *S. Sherwood*, for the complainant.

Mr. *G. Griffin*, for the defendant.

**THE VICE-CHANCELLOR:**—The question in this case is, whether the complainant, as surviving assignee of *Moses Q. Wood*, is entitled to be paid the balance of nine hundred and eighty-four dollars and ninety-one cents, and which remained in the hands of his co-assignee, out of the assets held by the defendant as administrator of such co-assignee who died insolvent, in preference to and in exclusion of the general creditors of the intestate?

If he is to be regarded in the light of a creditor, he can have no such preference: having acquired no lien upon the funds or assets of the estate. In such capacity he could only come in with other creditors for a rateable proportion in the course of administration. However, the complainant contends for a trust fund belonging to him as surviving assignee; and that, as such, it ought to be delivered over to him.

In order to give the complainant the benefit of this position, the money should appear to have been kept separate from the other fund of the intestate. As for instance, that it had been kept in a bag by itself or been deposited in a bank to his credit as assignee or that it had, in some way, preserved its identity and individuality as money belonging to the estate of the assignor, *Moses Q. Wood*. No such fact exists in the present case. The intestate mingled the moneys, received by him as one of the assignees, with his own funds. It has, consequently, lost its identity and cannot be distinguished from the intestate's other property; and, of course, cannot be followed and taken hold of for the purpose of being delivered over. The law on this subject is well settled: *Paley on Agency*, 83, 84.; *Whitcomb v. Jacob*, 1. Salk. 160.

I am decidedly of opinion the complainant has not shown a right to the money or assets in the hands of the defendant as a part of the trust estate under the assignment; and that

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the complainant has no greater rights to the balance admitted than a simple contract creditor of the intestate. He is only entitled to come in *pari passu* with other creditors. This bill is not filed for an account of the assets and payment of the claim as a debt against the estate of the intestate. It is not adapted to such a case. Indeed, there was no necessity for filing a bill in this court for the complainant's proportion as a creditor. It appears that repeated offers were made to pay him a just dividend. I shall not retain the bill even for this purpose. And if I had a desire to do so, the necessary parties (other creditors) are not before the court and the complainant has not shaped his bill so as to let them in. *It must be dismissed*; but as he has attempted to sue for the benefit of others, and, as I must presume, in good faith, he is excused from paying the costs of the defendant.

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### HACKETT v. CONNETT and others.

Although a court of law declines to determine a question of set off, yet this is not *res judicata* so as to preclude an inquiry in a court of equity having concurrent jurisdiction. Unliquidated damages, arising from a breach of covenant, give no right of set off at law; and the same rule applies in chancery even since the R. S. Although chancery has sometimes exercised the power of decreeing a set-off independent of the statute, it has only done so where there was either an express or implied agreement of stoppage *pro tanto* or mutual credit. There is no such thing as an inherent quality or right of set off in the creation of a debt or demand. It can only arise or attach when there is a mutuality of debts of such a certain and ascertained character as to be capable of set off or of being applied in compensation of each other. C. filed a bill against H. in October, 1829, which was dismissed on the 7th July, 1830, with costs. We filed another bill against H. on the 16th January, 1830, which was also, on the 19th October, 1830, dismissed with costs. In the month of April, 1830, C. had brought an action against H. for a breach of covenant and perfected a judgment therein on the 22nd November, 1830; but, prior to the judgment, he assigned the damages sustained in the action, to one A. Upon a bill now filed by H. to have the costs, upon the bills dismissed, set off against the judgment: It was held, that the right of set off did not exist, provided the assignment was a valid and unsatisfied one. But H. was allowed the option of a reference to a master upon this point within a given time or to have the bill dismissed with costs.

The object of the bill in this cause was to obtain the benefit of a set off.

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The Defendant, Matthew W. Connett, had hired premises of the complainant, James H. Hackett, under a written lease. In the month of October, one thousand eight hundred and twenty-nine, Connett filed a bill in this court against Hackett, charging a breach of covenant, and praying that the latter might be prevented from collecting rent. An injunction issued: but this was afterwards dissolved and on the seventh day of July, one thousand eight hundred and thirty the bill was dismissed with costs. These costs were taxed at one hundred and thirty-eight dollars and thirty-seven cents.

On the sixteenth day of January, one thousand eight hundred and thirty, a second bill was filed by Connett against Hackett to the same effect as the former one; and this bill was also dismissed on the nineteenth day of October, one thousand eight hundred and thirty, with costs. The latter were taxed at one hundred and twelve dollars and sixty-nine cents.

In the month of April one thousand eight hundred and thirty, the present defendant, Matthew W. Connett, brought an action against James H. Hackett in the Superior Court of the City of New York, on an alleged breach of covenant and recovered a verdict, in November term following, of three hundred and twenty-five dollars; and docketted a judgment thereon the twenty-seventh day of the same November, for four hundred and eighty four dollars and thirty one cents (being the amount inclusive of costs). A writ of fieri facias was issued.

It appeared that on the fourteenth day of October, in the same year one thousand eight hundred and thirty, Matthew W. Connett assigned to one George Alcock, subject to the claims of Messrs. Price and Sears (attornies), the damages sustained by him in the said action in the Superior Court; and on the twenty-second day of November following gave notice of the same to the attorney of Hackett.

Matthew W. Connett had become insolvent.

The present complainant, Hackett, had paid two hundred and ten dollars on account of the judgment; and this had satisfied the attorney's costs included in the judgment and some part of the damages; and, against the balance, Mr. Hackett now claimed to set off the amount due to him on the decrees of dismissal, notwithstanding the assignment by Connett to Alcock.

Previous to the present bill being filed, a motion had been made before the Superior Court for the benefit of the set off; which was denied.

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Mr. C. Baldwin, for the complainant.

Mr. W. S. Sears, for the defendants.

**THE VICE-CHANCELLOR :—**The defendants insist upon the result of the motion in the Superior Court as conclusive upon the complainant. The grounds of denying the motion there do not distinctly appear. As far as the views of the court at law have been ascertained, the merits were not passed upon. The judges considered it a case more proper for a chancery suit. They declined interfering, although they had the matter fully before them upon affidavits, and were competent, in the exercise of their equity powers over judgments in their own court, to determine the question. Still, whatever they may have intended and whether they did or did not pass upon the merits of the application, it would not be a matter *res judicata* so as to preclude an inquiry in this court, which has a concurrent jurisdiction. This point was expressly decided in *Arden v. Patterson*, 5. J. C. R. 44.; and by the Court of Errors in *Simpson v. Hart*, 14. J. R. 63. I must, consequently, endeavour to decide the question.

As the suit at law by the defendant Matthew W. Connett against the complainant James H. Hackett was for uncertain and unliquidated damages arising from a breach of covenant—and not for any thing in the nature of a debt or demand capable of being reduced to a certainty by calculation—there was no right of set off in such action at law. This is perfectly well settled: *Gordon v. Bowne*, 2. J. R. 150.; *Hepburn v. Hoag*, 6. Cow. 613. The courts of Chancery follow the rule of law in this respect: *Duncan v. Lyon*, 3. J. C. R. 351. Nor do I perceive the rule to have been altered by the Revised Statutes, which have undertaken to regulate the subject by pointing out in what cases a set off may be made: 2. R. S. 354. § 18.

Another difficulty existed in relation to a set off in the suit at law: Hackett's right to costs in the chancery suits had not



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then become perfect by decree so as to form debts in his favour until after the commencement of the suit at law against him. In order to make a debt or demand a set off, it must have existed at the time when the suit was commenced. Here, then, are two reasons why a set off was inadmissible in a suit at law. But the moment a judgment was obtained in the action, a right to a set off, founded upon the equity of the statute, attached: unless the assignment to Alcock, of which notice had been given, prevented it.

The chose in action was capable of being assigned. It appears to have been made over on the fourteenth day of October, one thousand eight hundred and thirty—there is no evidence to the contrary. The consideration for the assignment, as expressed in the body of the instrument, was a prior indebtedness to the defendants Messrs. Price and Sears, for costs and professional services rendered to the assignor Connett, and an old debt to the defendant George Alcock for goods sold and money advanced or paid for him; and the avowed object of the assignment was to secure and pay these debts, giving to Price and Sears the preference.

Even although we assume the assignment to have been made in good faith, yet it must be admitted that the assignee could only take, subject to whatever rights or equities then existed in favour of Hackett against Connett. What, then, were those rights and equities? The defendant at law was at liberty to make the same defence to the action as he could have made if no assignment had been executed; and the same evidence could have been used. But he could make no set off. The right had not attached. Although, by this time, the costs in chancery, under the decrees of dismissal, might have ripened into a debt, still the forms of law did not permit him to make it a set off upon the trial. Nor did it operate *pro tanto* as payment or compensation for the damages claimed in the suit. Neither had he, then, any right in equity to a set off. The court of chancery extends the principle no further than a court of law under the statute of set off: *Duncan v. Lyon*, *supra*. Although chancery has sometimes exercised the power of decreeing a set off, before or independently of the statute, it has only done so where mutual debts existed and where there was either an express or

implied agreement of stoppage *pro tanto* or mutual credit. Here, at the time of the assignment, there were not mutual debts—much less a mutual credit. There was only a debt on one side; and on the other, a claim sounding in damages, which, when it became liquidated by a verdict and judgment so as to admit of set off, belonged to another person. There is no such thing as an inherent quality or right of set off in the creation or origin of a debt or demand. It can only arise or attach when there is a mutuality of debts of such a certain and ascertained character as to be capable of set off or of being applied in compensation of each other. Hence, there was no equity of this sort to which the assignment in question could be subjected. The whole doctrine of set off was critically examined by Judge Story in *Gross v. Darling*, 5. Mason's R. 202.; and I had occasion to apply the principles laid down by him to the case, recently before me, of *Walcott v. Sullivan*, (see 1. vol. 399.)

I am of opinion the right of set off does not exist, provided the assignment is a valid one and debts not yet paid are really due to the defendants Messrs. Price and Sears and George Alcock.

The assignment makes no mention of the amount of these debts. Nor is there any evidence of it before me. Possibly the assigned claim may be more than sufficient to satisfy them or the parties may have obtained satisfaction elsewhere. If the complainant requires it, I will direct an inquiry to be had before a master in order to ascertain the amounts of the debts against Connett which the assignment professes to secure, and whether the same remain unsatisfied and unsecured by other property which may have come to the hands of George Alcock. There may yet be room for allowing a set off or compensation in part, if not for the whole of the balance due on the judgment against Hackett. But I shall leave it to his election to have a reference on the subject: at the peril of costs in case he fails; and this election is to be made in twenty days. If the complainant do not elect to take this course, the bill must be dismissed with costs.

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By our practice, it is not necessary for a vendor, under a covenant to convey, to make out and tender a deed on the day the purchase is to be completed. He is not bound to prepare it until the buyer is ready to demand it; and even then, the vendor is allowed a reasonable time to draw and execute the deed. And after being thus drawn and executed he is to hold it ready for delivery when required; and he is not in default until the latter request is made. Although a purchaser may prepare the deed and tender it for execution (and then only one demand is necessary) yet still the above appears to be the settled law of the State.

Parties entering into a contract may make time the essence of it.

A short delay, indeed even a delay for a length of time fairly accounted for and so as to repel the presumption of a waiver or abandonment of the contract, will not, ordinarily, deprive a party of his right to a specific performance. But, where the vendor requires and the purchaser agrees to make time a condition of the contract and they insert the same as a distinct and substantive part of the agreement, it must be kept.

Distinction between conditions precedent and subsequent.

Equity cannot relieve from the consequences of a condition precedent unperformed. But upon the breach of a condition subsequent which would work a forfeiture or divest an estate, a court of equity, acting upon the principle of compensation, will interpose and prevent the forfeiture or divestment, provided it can be given with certainty in damages. S. sold to W. a lot of land. By an agreement under the hands and seals of the parties, W. covenanted to build within a certain time and give a bond and mortgage for a part and pay the balance or give a bond and mortgage for the whole by a specified day; and S. covenanted to give a deed on this day. There was also a clause expressly showing that the agreement was, in all respects, to be void, provided W. failed to perform any one of the covenants. W. entered, but, from untoward circumstances and not from any act on the part of S., was not ready with his money or the bond and mortgage on the day specified in the agreement: but made a tender on the next day: Held, to be a condition precedent and that the court could not relieve.

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Purchaser.  
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Conditions  
precedent  
and subse-  
quent.

Bill, by vendee against vendor for a specific performance of a contract for the sale of a lot of land known as No. 706 Broadway, in the city of New York.

By the contract, under the hands and seals of the parties and dated the first day of September one thousand eight hundred and twenty-nine, the defendant, Clotilda Smith, covenanted, in consideration of and upon performance by the complainant, Benjamin G. Wells, of the covenants on his part, to convey to him the lot in question, free from all incumbrance, except such taxes and assessments as might thereafter become due. The complainant's covenants were

to the following effect: 1. To build a carpenter's shop on the rear part of the lot on or before the first day of March one thousand eight hundred and thirty, and not to remove the shop until the agreement was carried into full and complete effect. 2. To build and enclose upon the front of the lot a substantial brick house of three stories in height on or before the first day of August one thousand eight hundred and thirty-one, or, in lieu thereof and on the same day, to pay the defendant the sum of one thousand dollars on account of the consideration money. 3. To execute and deliver to the defendant, on the same day, a bond and mortgage (of the house and lot) for two thousand seven hundred dollars, payable with interest at six per cent. And if he did not pay the one thousand dollars on the said first day of August one thousand eight hundred and thirty-one, then this bond and mortgage were to be made out for three thousand seven hundred dollars, with interest: this being the full amount of consideration money for the purchase. 4. The complainant was to pay interest at the rate of six per centum per annum upon the sum of three thousand seven hundred dollars to the defendant from the date of the agreement to the first day of August one thousand eight hundred and thirty-one—the first half year's interest in advance—and all taxes and assessments.

The defendant also covenanted, on her part, to execute and deliver a deed for the lot on the first day of August one thousand eight hundred and thirty-one. And then followed this clause: "But upon this express condition and the agreement between the parties is such that if the said Benjamin G. Wells fails or neglects to perform all or any one of the covenants herein before contained on his part, at the time or times herein before limited, then and in such case all and singular the covenants and agreements on the part of the said Clotilda Smith shall cease and be absolutely void, and all the right, title and interest of the said Benjamin G. Wells in law or equity in the premises shall also cease, and thereupon the said Clotilda Smith, her heirs or assigns may immediately enter upon the premises and have and hold the same, with the carpenter's shop, free and discharged from any claims of the said Benjamin G. Wells."

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The complainant, Benjamin G. Wells, entered into possession of the lot, as purchaser, under the agreement ; and had performed all the covenants, except the erecting of a brick dwelling-house and paying or securing the purchase money on the day appointed.

All objection on the score of not building the house, appears to have been waived.

As the day approached for completing the contract, namely, the first day of August one thousand eight hundred and thirty-one, the complainant became desirous of paying the whole of the purchase money, instead of one thousand dollars only and giving a mortgage for the residue : as he wished to raise the whole on mortgage. The defendant consented to this, and agreed to execute a conveyance, provided the money was ready for her on the above day, but, at the same time, she gave him to understand he must not fail in doing this, and that if he suffered the day to pass without paying the money, she would avail herself of the condition expressed in the contract and refuse him the deed. A few days previous to the first day of August, the complainant attempted to procure the money and assured the defendant he should be ready with the whole amount or, at any rate, with the one thousand dollars : but his efforts to procure it failed : and the day passed without any tender of the money or demand of the deed being made. On the next day, however, (the second day of August) he obtained the whole amount, made a tender of it, and demanded the deed. The defendant refused to take the money and declared the contract to be at an end.

This led to the filing of the present bill.

Mr. C. C. Goddard, and Mr. S. P. Staples, for the complainants.

Mr. R. Bogardus, for the defendant.

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THE VICE-CHANCELLOR :—The covenant sought to be enforced in this case against the defendant is clearly a dependent one. An action at law could not be sustained upon it, without averring and proving performance of the covenants

on the part of the complainant. As the latter had not performed them on the very day specified in the agreement, it is probable his remedy is for ever gone at law; and unless, therefore, this court can aid him, all benefit of the contract will be lost.

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It has been contended in behalf of the complainant, that the defendant should have tendered a deed on the first day of August, in order to bring the complainant into default; and also, that the delay or failure on his part to pay the purchase money was owing to the defendant's not previously furnishing the draft or form of the deed to be executed by her, as was requested; in order that he might have had the title examined in season for the purpose of obtaining the money on mortgage of the property by the day fixed upon for completing the purchase. According to our practice, which is different from the English, it was not the duty of the defendant to make out and tender a deed on this first day of August. The party who is to give the deed has the same drawn at his own expense; but, under a covenant to convey, as in this instance, he is not bound to prepare the conveyance until the party who is to receive it is in a situation rightfully to demand it. And after such demand, the grantor is allowed a reasonable time for drawing and executing the deed; and he is then to hold it ready for delivery when called for and is in no default until a second demand is made. The purchaser nevertheless may prepare the deed and tender it for execution—and then only one demand is necessary. The above appears to be the settled law of this State: *Fuller v. Hubbard*, 6 Cow. 1.; *Connelly v. Pierce*, 7 Wend. 129.

Nor do I perceive how any portion of the delay which took place in examining the title, and which has produced all the difficulty, can be imputed to the defendant; provided she was not bound, in the first instance, to prepare the deed. An abstract of title was not requested. The complainant applied to her for the deed unexecuted, which she was to give him properly signed, sealed and acknowledged—and this was done, not because he could then have demanded it of her, but as a favor and for the purpose of having the records examined in regard to title and incumbrances. The complainant put this instrument into the hands of an attorney on

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Friday preceding the first day of August, for the purpose of having the necessary examinations made. But, for such a purpose, there was no occasion to wait until the proposed conveyance was prepared. The complainant held a counterpart of the written contract, which contained a full description of the lot, its location and boundaries; and by means of this instrument, the examination could have been made. The former title deeds appear not to have been asked for. Under these circumstances, the defendant was not in fault. Nor is she chargeable with causing the delay in setting about the title or with the dilatoriness wherewith the examination was conducted. The case then resolves itself into two questions: 1. How far was time the essence of the contract; and, 2. If the day was material, is the complainant to be relieved from the forfeiture consequent upon his non-fulfilment of the contract within the time specified?

Whatever notions may have been formerly entertained as to the time, specified in the contract, not being material and to be unregarded as an essential, it is now admitted that time may be made of the essence of the contract and effect will be given to it, as well in equity as at law. After examining a number of cases on the subject, Mr. Sudgen observes: "We may therefore venture to assert that if it clearly appears to be the intention of the parties to an agreement that time should be deemed of the essence of the contract, it must be so considered in equity:" p. 292. The observation occurs in early editions of this author's Treatise on Vendors. Subsequent decisions have proved its correctness. In *Hudson v. Bartram*, 3 Mad. R. 440. the Vice-Chancellor, Sir John Leach, following Lord Eldon in *Levy v. Lindon*, 3. Meriv. 84. and in *Boehm v. Wood*, 1 Jac. & W. 419. admits the principle that here, as at law, time may be of the essence of the contract, although a strict performance may be waived by the conduct of the opposite party. And the still later case of *Williams v. Edwards*, 2 Sim. R. 78. proves, how time may not only be made material as a part of the contract, but that a bill for a specific performance will be dismissed with costs where the parties have stipulated that the agreement should be void and delivered up to be cancelled if, in the opinion of counsel, a marketable title

could not be made by the time appointed for completing the purchase, and which time had elapsed. Upon the authority of these cases, the able writer to whom we have referred, in the last edition of his Treatise on Vendors, considers the doubt which had existed in relation to time being deemed a part of the essence of the contract as now at an end; and he observes further, it is difficult to understand how it ever arose: (Sugden on Vend. 8. Edit. 362.)

Since, then, parties entering into a contract may make the time of performance a material part of it, have they done so in the case now under consideration? The agreement in question is precise and particular as to the day on or before which several things are to be done. Those, on the part of the purchaser, are conditions to the defendant's giving a deed, and which is the only thing she is to perform. If the agreement had gone no further than merely to specify the day of performance, then, considering the subject matter of the contract, it might not be deemed in equity so essential as to require a strict performance on the day. And a short delay—indeed, even a delay for a length of time fairly accounted for and so as to repel the presumption of a waiver or abandonment of the contract, will not, ordinarily, deprive a party of his right to a specific performance. But, where, as in the present case, the vendor requires and the purchaser agrees to make it a condition of the contract and they insert the same as a distinct and substantive part of the agreement, namely, that a failure or neglect of the purchaser to perform all or any one of his covenants at the time specified (including the payment of the purchase money on a future day) shall absolutely determine the contract and the rights of the purchaser shall cease at law and in equity and the vendor be at liberty to re-enter and hold the property discharged from all claim by the purchaser, it appears impossible to regard it as an unmeaning provision. If there be any form of words by which parties can bind themselves to strict performance, they have done it in this instance. Nothing can be stronger than the clause in question. It is full and explicit, and leaves no room to doubt the intention of making time an essential ingredient of the contract.

The next question then is: whether this court, under the

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circumstances, can relieve the party from the consequences of his own default?—a default, as already observed, not imputable to the defendant or founded upon any waiver on her part or attributable to accident, mistake or surprise so as to authorise an interference on any such account. It is a naked case of a condition unperformed within time. Much depends upon the nature and effect of the condition. The uniform object of a condition is to defeat or avoid an estate: *Preston's Shep. Touch.* 117. If it be a condition precedent, it defeats or rather avoids the estate, by not permitting the estate to vest until the condition is literally performed. In case it be a condition subsequent, the non-performance defeats the estate, by divesting the party of his title and the interest already vested: because the continuance is made to depend upon the performance of the act or the happening of the stipulated contingency. The first operates by giving an estate and conferring a benefit; and the second, as a defeazance or the destruction of an estate already raised and vested. This distinction is important in the view of a court of equity: because it can, upon principle, interfere with and controul the effect of one species of condition and not of the other. The condition of the contract in question is clearly a condition precedent. No one can peruse it without perceiving that every act which the complainant has stipulated to perform is antecedent to what the defendant is to do. The performance of the covenants on the part of the former are made the consideration for the covenant of the latter to convey to him. It is only upon these conditions, a deed is to be executed and delivered. If he fail in any one particular, the agreement ceases to be obligatory upon her. It is true he was to go into possession, make improvements on the lot and pay interest on the purchase money, as well as all taxes and assessments, but all this appears to be the result of a mere possessory right as tenant until the time for a fulfilment of the contract should arrive: and not the effect of any vested right or title. There are no words of grant in the contract itself. It rests merely in covenant on the part of the defendant, and no estate was to arise to him except upon the performance of the condition. This is, therefore, the case of a condition precedent, where no estate vests in law until the condition is perform-

ed: Coke Litt. 206. a.; *Harvey v. Aston*, 1 Atk. 361. S. C. West's R. 350., and Com. Rep. 726.

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It is next to be seen whether, in such cases, a court of equity can aid the party and help him to the estate notwithstanding the breach of the condition?

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Whatever confusion there may be in some of the earlier cases on the subject—and it must be admitted there are some which seem to be contradictory and irreconcilable and a few which appear to have been reversed in the House of Lords (1. Chan. Ca. 90. note; 1. Eq. Cas. Abr. 107. B.; Freeman's C. R. 35. and 220. n.; 1. Vern. 83.; 3 Ch. Cas. 119. and Colles' P. C. 10.) yet when we come down to the period of a more systematic equity jurisdiction, we find the decisions assuming greater steadiness and uniformity of character on this point. I shall begin with the decision of Lord Hardwicke in *Reynish v. Martin*, 3. Atk. 330. In this case, a legacy had been left to a daughter, upon the condition of her marrying with the consent of her trustees. She had married without their consent. A bill was filed for the legacy. His Lordship noticed the objection of its being a condition precedent unperformed. And he considered that, as there had been a breach of the condition and because the law would not, therefore equity could not help the party. In reference to the legacy being originally a charge upon lands, he observed, "It must have the same consideration as a devise of lands would have; and in that case, nothing could be clearer than that the legacy could not be raised, because nothing vested before the condition performed."

The case of *Hervey v. Aston*, above referred to, was similar and involved the same principle. It had been previously decided by Lord Hardwicke on an appeal from the Rolls; and, after an elaborate discussion, it was decided by his lordship with the assistance of the judges. I would next refer to *Scott v. Tyler*, before Lord Thurlow (2 Bro. C. C. 431.) as containing a full exposition of the law on this subject. Here, also, was a legacy given upon condition of the legatee's marrying with the consent of her mother; and which had not been done. The question as to the validity of such a condition, as well as the effect of non-performance, drew forth able and learned arguments from the numerous

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counsel in the cause, and among whom we find Mansfield, Scott, Hargrave, Plumer and Mitford. The argument of Mr. Hargrave embraced and explained in the clearest manner the doctrine and effect of conditions precedent and subsequent and the jurisdiction of equity over them—and which argument the counsel based upon a review of all the cases. He showed, I think, very conclusively and upon the soundest principles, that equity cannot interpose to relieve from the consequences of a condition precedent unperformed, although, with respect to conditions subsequent the doctrine is very different. The decision of Lord Thurlow was in accordance with this view of the law and with Lord Hardwicke's judgment in the former cases.

The decisions in *Powell v. Pellett*, 2 Eq. Ca. Abr. 209. pl. 3. and *Sweet v. Anderson*, 2 Bro. P. C. 256. are also authorities for the same doctrine and bear directly upon the point.

And this doctrine I consider to be brought down to the present day by the recent cases of *Duffield v. Elwes*, 1. S. & S. 239.; *Long v. Ricketts*, 2. S. & S. 179.: and *Clifford v. Beaumont*, 4. Russ. 425. It is founded in reason and justice. A man enters into a contract or makes a deed of settlement or a will (the instrument is immaterial) and he agrees to grant or devise an estate upon a condition which he declares must be performed before the person to be benefitted can take it. No court of law or equity can have a right to say that the condition, which is lawful in itself and one the party had a right to impose, shall be dispensed with. In order to do this, the contract or act of the party himself must be annulled and one created by the court put in its place. This would be contrary to reason and the assumption of a power which I, for one, must disclaim.

The principle whereon the court is to act in relation to conditions subsequent is widely different. In cases of this sort, if a breach or non-performance happens, the effect of which is to work a forfeiture or divest an estate, the court, acting upon the principle of compensation to the party for the injury sustained by the breach, will interpose and prevent the forfeiture. On account of the nature of conditions subsequent, they are said to fall within the lenient principle by which equity relieves against penalties; and the court will

only give relief where compensation can be made in damages. There may even be cases of conditions subsequent unperformed in which the court will not relieve from forfeiture on account of the difficulty of ascertaining, with any degree of certainty, the amount or adequacy of compensation to be allowed: *Jeremy's Eq. Jur.* 475. It is unnecessary, however, to pursue this branch of the subject. The present case does not fall within it.

There is one view taken of this cause upon the argument which I feel bound to notice. It is this, that the contract between the parties is, in effect, a sale and a mortgage back for the purchase money and the purchaser going into possession under the contract makes it so; and that it operates as a mortgage to the defendant who has all the security and rights of a mortgagee and the complainant the rights of a mortgagor entitled to redeem, even though the mortgage may be forfeited by non-payment on the day specified. By way of meeting some portion of this argument, it may be asked: why did not the parties put the transaction in the form of a conveyance of the title and legal estate and of a mortgage back, by executing the proper instruments for the purpose, provided they intended it should have such an effect? Now, this they have not done; but, on the contrary, have left the whole to rest in covenant. The title did not pass; and I am not at liberty to suppose the parties intended it should have passed, or that any effect was to be given to the contract beyond the plain import of its terms or inconsistent with the rules of law. The great difficulty, however, in giving to the transaction the effect of a mortgage and regarding the parties as mortgagee and mortgagor is, that no legal title or estate has ever vested in the complainant:—for, as before remarked, the contract amounted to an agreement to convey and that too upon a condition, and not to a conveyance. In my judgment, the whole claim and right of the party depends upon this point.

With respect to mortgages in general for securing the payment of money, it may be observed, that the conditions upon which they are given are conditions subsequent, and, therefore, in regarding them as they are known to the common law—independently of improvements growing out of

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statutory regulations—the court of chancery can always relieve from a forfeiture of the estate on a breach of the condition: because it is enabled to award compensation in the payment of principal and interest of the debt to the mortgagee. As I feel myself bound to give effect to the transaction between these parties as a mere matter of contract *in fieri* and constrained by principle and upon authority to regard the condition of the contract in this case as a precedent condition, the strict performance of which was necessary in order to entitle the complainant to a fulfilment of it on the part of the defendant, I cannot extend to him the relief of a mortgagor. The consequence may be a great hardship upon him: but this he, himself, should have foreseen and prevented by a greater diligence on his part and on the part of those upon whom he was induced to rely for the means of completing the purchase. A little exertion would have accomplished the object and saved trouble and expense.

The bill must be dismissed; but, under the circumstances, without costs.

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STAGG

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STAGG v. BREKMAN and others, executors of RUTGERS,
deceased.

A trust is not to fail for want of a trustee or from any other cause, unless it would be inconsistent with public policy or the law of the land

In equity, a mere bequest by a creditor to his debtor is not necessarily or even *prima facie* a release of a debt. The court requires evidence clearly expressive of the intention. If it be neither expressed nor apparent upon the will, evidence *aliunde* may be admitted.

H. R., by his will, bequeathed \$1,000 to H. R. S. By a codicil, he devised a lot of ground to the same person in fee. But by an after-codicil, he revoked both the legacy and devise; and directed his executors to hold them for the sole benefit of the said H. R. S., subject to the order and direction of the court of chancery and so that his creditors should take no part of it. And if this could not be done, then the whole of the said devise and bequest were to sink into the residue. Afterwards, H. R. S. borrowed \$500 of the testator, and gave a promissory note for the amount payable in a year with interest. Held, that the executors were trustees for the said H. R. S. as to the rents and income of the lot and bequest; that there was no lapse as to these; and that under the circumstances the debt of \$500 was to be deducted and the balance only of the \$1000 considered as held in trust for him.

The late colonel Henry Rutgers made his will and also *June 24th.*
added several codicils to it. By the will, he directed his 1833.
executors to pay the sum of one thousand dollars to Henry *Will.*
Rutgers Stagg, the complainant, which he gave and bequeath- *Legacy.*
ed to him for ever. He directed that all his devisees and le- *Legatee*
gatees should receive the shares and bequests free from any *owing testa-*
charge; and authorised his executors, at their discretion, to *tor. Trust.*
compound debts where the debtors, from misfortune or other-
wise, might be unable to pay or, if his executors thought it
just, to forbear suing such debtors altogether.

By one of the codicils, there was a devise in favor of the complainant in the following words: "I also give and devise that certain lot of ground in Market street aforesaid, distinguished on said map as lot number 455, unto Henry Rutgers Stagg his heirs and assigns for ever." By an after-codicil, the testator directed that the devise of a lot of land to Henry Rutgers Stagg and the legacy theretofore bequeathed to him should be revoked: and he ordered and di-

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rected his executors to hold the same for his personal use and benefit: subject to the order and direction of the court of chancery, his will being that the creditors of the said Henry Rutgers Stagg should not take the same or any part thereof, but the same should be applied solely for his personal benefit—and, if by law that could not be done, then the whole of the said devise and personal bequest should lapse and be a part of the residuary estate.

The complainant had, on the sixteenth day of September one thousand eight hundred and twenty six, given to the testator (for money borrowed) his note, for repayment of five hundred dollars within a year from the date. It was conceded that he was poor and would be unable to pay the note: unless the amount was taken out of the legacy.

The case was submitted to the court upon the following questions:

1st. Whether the devise and legacy to the complainant could be preserved by this court or whether it lapsed?

2nd. If they did not lapse, whether, under the circumstances, the amount of the note was to be deducted from the legacy of one thousand dollars and the balance paid or whether the whole of such sum was to be paid?

3rd. Whether, if the court sustained the devise and legacy, the defendants ought not to pay the costs and expenses of the suit out of the estate?

And it was agreed between the parties that the devise and legacy should be conveyed to a trustee, in case they were so sustained—and the same, as to any balance.

Mr. H. E. Davies, for the complainant.

Mr. John L. Riker, on the part of the defendants.

THE VICE-CHANCELLOR:—As the codicil revokes the bequest of the legacy and the devise of the lot, and substitutes the direction to the executors to hold the same for the complainant's personal use and benefit (subject to the order and direction of the court), it is manifest the testator intended to create a trust which equity should protect and preserve, if possible, for the benefit of the complainant, to the exclusion

wards takes place; a note is given for it; this note is kept in the testator's possession uncanceled; and in the last codicil nothing appears to show an intention to increase the bounty beyond what was originally contemplated; such however, will be the effect, provided the complainant can retain the sum advanced and also receive the benefit of the whole original bequest:—taking the note and preserving it among his papers, are all circumstances which clearly indicate that the testator intended the advance should remain as a debt against his legatee and be deducted and retained by his executors. This they have a right to do: *Jeffs v. Wood*, 2. P. Wms. 128.; *Rankin v. Barnard*, 5. Mad. R. 32.

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The clause in the will authorising the executors to compound with any of the debtors to the estate and to forbear suing altogether, is not sufficient to warrant a contrary conclusion. It does not go to the extent of releasing the debtors. It shows the humane and benevolent feelings of the testator towards those who might be poor and unfortunate; and, although the complainant may be of that class, still the executors would hardly be justified, under their discretionary power, in suffering the opportunity to pass of realizing this debt by a non-exercise of their right to retain and deduct the amount of the note and interest out of the legacy.

The balance only must be considered as held in trust for him.

A provision made by the will for the costs and expenses of carrying its trusts into effect, may fairly be considered as embracing the costs of this suit. They must be paid out of the remainder of the testator's estate.

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Counsel have no right to advise a witness who is before an examiner, that he is not bound to answer a particular question.
If the witness objects he should demur.
It is the duty of the examiner to inform a witness of his legal rights.

July 8th. This was a question of practice. A witness, who was
1833. giving his testimony before an examiner, was advised by
~ counsel that he need not answer a particular question which
Practice. was put. The relevancy of it was left to the court; and the
Examination of Witness. VICE-CHANCELLOR, in the course of his opinion, made the
following remarks:

The counsel of the parties have no right to interrupt the examination, by advising a witness that he is not bound to answer the question. If such question be deemed improper or irrelevant, the counsel should state his objection to the examiner; and not undertake, in the first instance, to advise the witness. The examiner will dispose of the objection in one of the modes pointed out by the 85. Rule; and should the witness be required to answer the question under either course which the examiner has power to adopt and he (the witness) should think proper to object on his own account or for reasons which concern himself, his objection should be made by way of demurrer to the question. In this form, it can come before the court in order to be decided; and it then becomes a matter upon an issue between the witness and the party examining him.

If such a formal demurrer be not put in and the witness should, nevertheless, refuse to answer, the matter can be brought before the court upon a motion for an order to compel him to answer on pain of contempt.

When a question is put which would require an answer

that might subject the witness to a penalty or forfeiture or tend to criminate or render him infamous, I think it is the duty of the examiner to inform the witness of his legal rights; and to say to him, that he is not bound to answer such questions.

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I see no objection to a witness asking advice of the opposite counsel or of any other counsel to whom he may think proper to apply, whenever he desires to demur or object.

THE PRESIDENT &c. of the CITY Bank v. BANGS and others.

A participation in a public reward is not wholly incompatible with the duties of public officers or against the policy of the law.

If a particular house or place is to be searched for stolen goods, a warrant should be obtained designating the place particularly and describing the property in the warrant, in order to justify the officer in making a search provided it should prove fruitless.

Still, generally, stolen property may be stopped or taken in any place, either by a private citizen or public officer, without a search warrant; and it is especially the duty of the officer to do it.

When a felony has been committed, a police officer is justified, without a warrant, in examining the trunks, pocket book or other articles of personal property possessed by a boarder, upon the suspicions of the keeper of the boarding-house.

Police officers acting without a warrant, upon the information and at the request of a private citizen, and who are instrumental (through such information) in the recovery of stolen property for which a reward is offered, will not be entitled to the reward merely upon the score of risk assumed or liability incurred in acting without a warrant.

When a reward is offered for the recovery of property, it is extended beyond persons who merely act ministerially. The criterion for determining to whom the reward belongs is this: who is the person that has acquired a knowledge of the facts necessary to a detection or discovery of the thing stolen or lost and has imparted such knowledge with the intent and for the purpose of bringing about a recovery or restoration of the property, taking upon himself the risk and consequences of a failure, and acting with a view to the reward, if his suspicions and disclosures are well founded and successful? In such a case, therefore, the mere officer who acts in his duty will not be entitled. It is not like the case of salvage in the marine law.

A servant, whose information to a mistress may have given the first cause of suspicion of a robber, will not be entitled to any part of a reward offered for the restoration of stolen property, where such information was not given with an intention of inducing the mistress to act or of the servant's becoming an instrument towards its recovery.

The City Bank was robbed. A large reward was offered for the recovery of the property, and a proportionate sum for any part. B., the keeper of a boarding house, from information given him by his wife, suspected a boarder. B. went to a police officer, stated his suspicions, and wished the latter to go with him. He did, accompanied by other officers; some of them had warrants. They were led by B. into his house, who pointed out the trunks of the boarder, he being absent. One of the officers unlocked a trunk and found the stolen money: HELD, that B. was entitled to the whole of the reward.

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Public
Robbery.
Reward.

This case arose before the Chancellor. The President, Directors and Company of the City Bank had filed a bill of Warrant.

1833. interpleader ; and paid into court the sum of seven thousand
 CITY BANK four hundred and sixty dollars and ninety cents, being the
 v. proportion of a reward of ten thousand dollars offered by
 BANGS. them for the recovery of a large sum which had been stolen
 from the bank.

After the chancellor had ordered a reference to a master, for the purpose of ascertaining who, amongst the defendants, was entitled to the fund : (See 2. Paige's C. R. 570.) The cause was referred to his honor the Vice-Chancellor of the first circuit : and it now came before him on the master's report.

Mr. *R. Bogardus*, for the defendant Henry Bangs.

Mr. *Wm. M. Price*, and Mr. *O. Hoffman*, for the defendants Jacob Hays, Zebulon Homan and Benjamin J. Hays.

Mr. *Mulock*, for the defendant Maria Van Riper.

Oct. 21st.

THE VICE-CHANCELLOR :—All the parties who are defendants in this cause have taken exceptions to the master's report. Those, of the defendant Henry Bangs, go to exclude the defendants Jacob Hays, Zebulon Homan, Benjamin J. Hays and Maria Van Riper from any participation in the reward which had been offered by the complainants ; claiming, for himself alone, the whole of the amount. The exceptions taken by Hays, Homan and Benjamin J. Hays, jointly, do not extend to the entire exclusion of Bangs, for they admit his right to participate, but insist that a greater sum is reported in his favor than he ought to be allowed ; that his allowance ought to be diminished and their own increased ; while as respects the defendant Maria Van Riper, that she is not entitled to any part. And the defendant Maria Van Riper excepts, on the ground of the smallness of the sum reported in her favor, insisting upon her right to a much larger amount, in common with the defendant Mr. Bangs, alleging how the other defendants, from being public officers, were not entitled to any share or participation in the reward.

Hence none of the exceptions taken adversely to Henry Bangs entirely deny his right. They only go in diminution

of his claim; while those taken by him extend to the whole right as set up by the other parties. If, therefore, his exceptions are found to be well taken, there will be an end of the controversy: for it will follow, as a matter of course, that he is entitled to the whole of the fund. And, consequently, in this stage of the case, the question is whether the other claimants are entitled to any thing—and if so, to how much?

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I shall first consider the joint claim of Jacob Hays, Benjamin J. Hays and Zebulon Homan. These persons were public officers attached to the police department. Their general duties, as such, are to arrest persons chargeable with offences of a criminal nature and to bring them before a magistrate for examination. They are also to search for stolen property, and, when discovered, to take possession thereof, with a view to its being restored to the rightful owner. For their services in the discharge of such duties, they are entitled to a stated compensation or to certain fees allowed by law. It has been contended that public officers ought not to be permitted to receive gratuitous rewards, because they are bound to a prompt and vigilant discharge of their duties, without the hope or expectation of being thus compensated; the policy of the law, which has in view the safety of the community, is said to be against it; and self-interest, if they are allowed to participate in rewards as a remuneration for services, will cause them to be indifferent and even remiss, until prompted by what they, themselves, may deem a sufficiently liberal offer; so that no active exertion will be made to arrest felons or to recover stolen property, without an incentive of this sort. There is considerable force in this argument; and some illustrations have been given which show how the practice of allowing public officers to participate in rewards may lead to abuse. Still, I am not prepared to say, they should be entirely excluded. Rewards are offered only when it is supposed the ordinary means of discovery and detection would prove ineffectual. They are voluntary offerings and adapted to what the party making the offer deems to be the necessity and urgency of the occasion. The object is, to awaken public attention to the subject, excite vigilance, and call forth extraordinary individual efforts for the accomplish-

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ment of the end proposed to be gained. All who choose to engage in it are at liberty to do so ; and he who succeeds becomes entitled to the reward, upon the ground of his superior vigilance or sagacity or of his having used greater exertions or encountered dangers which others were disinclined or not in a situation to hazard. When, therefore, we view the object of rewards, offered thus publicly, in their true light, a participation in their benefits or in the receipt of them cannot be considered wholly incompatible with the duties of public officers or against the policy of the law.

The case of *Weaver v. Whitney*, Hopk. 11. was widely different from the present ; and the principles upon which it was decided do not apply. In *Hatch v. Mayn*, 9. Wend. 262. there is a principle bearing more directly upon this subject. It was held that an officer whose duty it was to serve process might recover compensation over and above the fees allowed by law when, on a promise of reward, he uses extraordinary efforts beyond those which an officer is strictly bound to make or which could legally be required of him.

Then, since the law does not exclude public officers from *extra* rewards, I shall proceed to examine the merits of the claim made by these parties, through the facts and testimony in the cause.

The City Bank had been entered by means of false keys and robbed of a large amount of bank notes and money. The directors advertised the same ; and publicly offered a reward, in the first instance, of five thousand dollars, but which was increased in a few days afterwards to ten thousand dollars, "for the recovery of the property and a proportionate sum for any part." On Monday, morning when it was first discovered the Bank had been robbed, one of the police magistrates and three of the officers of the police, being the persons before named, were sent for, and upon being informed of the manner in which the robbery had been committed, the suspicions of the justice and officers were immediately fixed upon Smith and Murray, the two persons who, it was eventually proved, were the perpetrators—indeed, Jacob Hays expressed a confident belief of their being the parties. He and Homan then proceeded to Smith's dwelling-house in Divi-

sion street, and searched it, but without discovering any trace of the stolen property. Smith was from home. The same morning, Benjamin J. Hays was despatched to the south; and, in the afternoon, Homan set out eastward in search of the robbers. The bank advanced money to defray the expenses. In the mean time and during the week Jacob Hays appears to have continued the search in New-York. He called once or twice more at Smith's house and inquired for him of his wife, who, either couldn't or would not give any information as to where he was; and this officer's efforts, whatever they were, did not lead to any discovery of the robbers or of the property. While Benjamin J. Hays and Homan returned with no better success.

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During this time, suspicions were excited in the minds of Mr. Bangs and his wife (and especially by the latter) in relation to a stranger, calling himself Jones, who had come to their house as a boarder on the same Monday morning on which the robbery was known; and his conduct was closely observed by Mrs. Bangs. A variety of circumstances transpired from day to day, having a tendency to increase these suspicions; and, finally, on the following Saturday evening, she became so thoroughly convinced of his being the bank robber, and that his trunks contained the stolen property (and which, appearances indicated he was about to remove) that she insisted upon her husband's taking measures to arrest him. Mr. Bangs accordingly determined to do so. He called upon one of his neighbours, a Mr. Hollingshead, to whom he had, the day before, communicated his suspicions, and inquired where he could get an officer to arrest Jones; whereupon Hollingshead went with him to Jacob Hays' house and introduced him to the latter person. Mr. Bangs then communicated his suspicions to Mr. Hays. The latter enquired of the former, if he wished him to go along with him? to which the replied that he did, and stated that he came there to see him for the purpose of having him go and arrest Jones. Mr. Hays then turned to his son, Benjamin, and asked him to walk with them. They all started together for Mr. Bangs' house. Near to it they accidentally fell in with Mr. Homan. Mr. Bangs was the first to enter the house and ascertained that Jones was absent; and then, for greater precaution, he let them all in

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through a gate in the rear and conducted them to the back door, through which the party entered, ascended the stairs, and were shown into Jones' apartment. His trunks were in the bed-room adjoining the sitting-room. Mr. Bangs showed Jones' trunks to the officers. They were then drawn into the sitting-room and opened by Benjamin J. Hays with one of his keys; and one of the trunks was full of the stolen bank notes. Upon this discovery being made, the trunks were locked again, replaced in the bed-room, and, at Mr. Bangs' request, the officers remained for the purpose of arresting Jones the moment he should return. For this purpose, Mr. Bangs concealed them in a room below. About twelve o'clock at night, Jones came in and went to his room; and then, Mr. Bangs gave a signal to the officers and accompanied them up stairs, where they arrested him. Jacob Hays and Homan conducted the prisoner to the watch-house, and Bangs and Benjamin J. Hays, assisted by Hollingshead, carried the trunk which contained the money to Jacob Hays's house, where it was deposited for the night—and from thence they all proceeded to the watch-house. The next morning (Sunday) the trunk was removed to the City-Hall, Mr. Bangs being present, where the money was counted and delivered to the president and cashier of the bank.

This is the statement, substantially, given by Hollingshead, upon his examination as a witness, of the discovery of the stolen property and of the arrest of the identical Smith, who had assumed the name of Jones.

I think much depends upon the motive of Mr. Bangs in calling upon Mr. Hays on this occasion and the part which he and the officers acted upon arriving at the house of the former.

It is contended on the part of the officers, that Mr. Bangs only intended to communicate his suspicions and then leave them to act as they might think proper: taking upon himself no responsibility and withdrawing entirely from any participation in the enterprise; and Justice Hopson's testimony is relied upon for the purpose of establishing the fact. It appears by this gentleman's testimony, that, immediately after lodging Smith in the watch-house, Jacob Hays went to Mr. Hopson's dwelling, called him from his bed, and informed

him the money was found and of Smith's being detected. The justice and Hays then went together to the house of the president of the bank, gave him information, and immediately returned to the watch-house. In answer to the question of what was done there? Mr. Hopson states that he inquired of Jacob Hays, in the presence of Homan, Benjamin J. Hays and Mr. Bangs, where the money was found and at whose house? when Jacob Hays informed him (while the persons last mentioned were standing by) that it was found at the house of Mr. Bangs. Strange as it may appear, it would seem not to have occurred to the police magistrate to inquire of Jacob Hays to mention how or where the money had been found until they entered the watch-house and were in the presence of Mr. Bangs. Mr. Hopson then proceeds to state that immediately thereupon a conversation ensued between Benjamin J. Hays and Homan and himself, while Mr. Bangs was present, in relation to the recovery of the money and the detection of the robber and in which conversation Benjamin J. Hays told him, he unlocked the trunk in the upper room with a key which he had in his pocket, while Mr. Bangs was in the lower room, the latter having declared he would take no responsibility upon himself, and that this was stated in such a way as to give the idea of Mr. Bangs' refusal to stay in the room and of his declining to assume any responsibility. The witness says this conversation was loud enough to be heard by the persons present and his impression is that Mr. Bangs must have heard it. Mr. Bangs, it appears, was silent and the witness never heard him say any thing on the subject.

In order to show that either Mr. Hopson is mistaken as to the time and place of this particular conversation or that Bangs did not hear it and is not, by his silence, to be considered as having admitted the truth of Benjamin J. Hays' statement, a number of witnesses, who were present during the whole of the time when the magistrate and parties remained at the watch-house, have been examined.

The testimony of Woodruff and Wells goes far to show that no such conversation did take place there at the time referred to or, if it did, that it was not sufficiently audible to be heard by the bye-standers. They heard no such conver-

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sation and believe it could not have been heard by Mr. Bangs: for he and they were close together. Neither did the captain of the watch nor the watchmen hear any thing of it. From this evidence, it is, at any rate, safe to conclude that the conversation between the magistrate and officers was not heard; and, consequently, any statement alleged to have been made by the latter is not to be received as evidence against Bangs on the ground of his not contradicting it.

There is nothing, then, in opposition to Hollinghead's testimony in relation to the proceedings of Mr. Bangs on Saturday evening or in the manner in which the discovery of the stolen property or arrest of the thief was brought about.

According to the evidence, Mr. Bangs did not shrink from the responsibility, but acted throughout as the principal in seizing the trunks and arresting the felon. It appears from Mr. Randell's testimony (which is corroborated) that Mr. Bangs took legal advice of him on Friday evening as to how he should proceed, stating his suspicions of the boarder in his house and the circumstances which gave rise to them. And, the next evening, when the further circumstances had transpired which determined him to act, he followed the advice which Mr. Randell had given him. This advice was, to take a person as a witness and go to Mr. Hays and procure his assistance. There is no doubt the application was made to Mr. Hays as an officer of the police and that the object of Mr. Bangs was to procure his attendance as such officer, and that both he and his son Benjamin J. Hays consented to go in their official capacities. On meeting with Mr. Homan, he joined them in the same character.

It is said, however, that they had no warrant either to search or arrest and could not act officially and that, whatever they undertook to do was as private citizens and upon the risk of being deemed trespassers, provided the suspicions of Bangs proved groundless. No warrant, indeed, was ever issued by the police magistrates in the case of this most extraordinary robbery. Whatever pursuit or search took place during the week was without authority of warrants. This affords a strong presumption that, in the opinion of the magistrates and officers attached to the police, the issuing of warrants in such a case is unnecessary—especially when the felony has become notorious.

But: what is the law as to the necessity or non necessity of an officer's being armed with a magistrate's warrant? It is true that if a particular house or place is to be searched for stolen goods, a warrant should be obtained designating the place particularly and describing the property in the warrant, in order to justify the officer in making a search, provided it should prove fruitless. Still, without a search warrant, stolen property may be stopped and taken in any place, either by a private citizen or public officer, and it is the duty of the latter more especially to do so, with a view of restoring such property to the rightful owner and of convicting the offender. A warrant is not necessary to render the acts of an officer official in this respect; and he is paid by the public for his services, whether he has or has not a special warrant. In the present case, I cannot believe a search warrant was necessary to justify the officers in unlocking and examining the trunks of this boarder, if he had been innocent. A felony had been committed in the stealing of property of a description likely to be concealed in trunks—Mr. Bangs had reasonable grounds for a suspicion that those brought into his house at this particular juncture contained the stolen property; and this he not only communicated to the officers, but brought them to his house, led them up stairs, and pointed out the trunks which they were to examine. And if, under the same circumstances, he had, in the first instance, pointed out the boarder himself, and—charging him as the bank robber—had required the officers to arrest him and search his person for the stolen money, and they had done so, and on taking him before a magistrate, he had proved his innocence and been discharged, the officers would not have been liable in an action either for false imprisonment or in any other form. If any right of action had thereby accrued, it must have been against Bangs alone. And even he would have been excused in law, if the charge was made upon reasonable grounds of suspicion and in good faith on his part. The law upon this subject appears to be well settled. In *Holley v. Mix*, 3. Wend. R. 350. Chief Justice Savage, in delivering the opinion of the Court, examined the English cases; and, upon their authority, lays down the law that if a felony has been committed by the person arrested, the arrest

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may be justified by any person without a warrant, and this too whether there is or is not time to obtain one. If an innocent person is arrested by a private individual upon suspicion, the latter is excused for having made such arrest provided a felony had been committed and there was reasonable ground to suspect the person arrested. But, if no felony had been committed, and a private citizen was arrested without warrant, such arrest would be illegal, although an officer would be justified if he acted upon information from another which he had reason to believe was true. If, in the last case, an officer would be justified in arresting the person and taking him before a magistrate for examination, I am at a loss to perceive any good reason why he may not primarily examine the person's trunk, pocket book or other article of personal property which may be placed within the reach of the officer for the purpose of discovering, if possible, the stolen goods, and of ascertaining, with more certainty, the guilt or innocence of the accused. Upon established principles of law (which very wisely extend their protection to officers of this description beyond any other class of individuals during the time of their acting in the discharge of their official duties,) it appears to me they could not have been made liable as trespassers or in any other manner for entering the bed-room of the boarder to which they were conducted by Mr. Bangs himself and there opening the trunks, even if nothing had been discovered to warrant further proceedings. Whatever responsibility was thereby incurred, must have rested on Mr. Bangs and not upon the officers.

In my opinion, therefore, there is no ground for the latter claiming any portion of the reward upon the score of risk assumed or liability incurred in acting without a warrant. They were officers of the police in the discharge of their ordinary duty to the public; and, although instrumental in restoring the property to its rightful owners, yet they were as the mere conduit through which the recovery was passed. Mr. Bangs was the moving cause; by his means or those which belonged to him the property was recovered; to his vigilance and determination (or to that of his wife's, which is the same thing) the recovery may be fairly attributed. The good sense and meaning of the terms "for the recovery

of the property" as contained in the advertisement extend the promise of remuneration beyond the persons who act only ministerially in the matter. The criterion in these cases ought to be this: who is the person that has acquired a knowledge of the facts necessary to a detection or discovery of the things stolen or lost, and has imparted such knowledge with the intent and for the purpose of bringing about a recovery or restoration of the property, taking upon himself the risk and consequences of a failure, if it fails, and acting with a view to the benefit of the reward, if his suspicions and disclosures are well founded and successful? This principle I think appears in *Fallick v. Barber*, 1. M. & S. 108; and it goes to exclude entirely the claim of the officers to any participation in the reward in question.

Indeed, if they should be entitled to any thing, then there are a number of others who have contributed, in a degree, by their advice and assistance, to the recovery and restoration of the property who, upon the same principle, would be entitled to share, but who have not claimed. Mr. Hollingshead may be mentioned as one. But it is impossible to admit such claims upon any just principle. The rule by which to determine the relative rights of such claimants would be altogether arbitrary. It is not like the case of salvage in the marine law, where the salvors are all engaged in one common enterprise and mutually participate in its perils and dangers. Here, no such circumstance exists applicable collectively to Bangs and the officers.

My conclusion upon this branch of the case is that no right to an equitable apportionment of the reward is established on the part of any of the officers.

There is pretty strong evidence that Jacob Hays, both publicly and privately, in conversation with individuals immediately after the detection and recovery, disclaimed all right to the reward. Still, I do not place much stress upon this circumstance: for, if, upon any sound principle, he was entitled to claim, his declarations thus made would hardly be sufficient to deprive him of his right. He did, in fact, put in a claim about the same time and there are reasons why he might have wished to consider it a matter of private

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concern and not one with which the public mind should be excited, perhaps, to his prejudice.

I now come to the claim of Maria Van Riper for a portion of the reward. She was a domestic in the family of Mr. Bangs and claims upon the ground of contributing, in the way of discovery and information, to Mrs. Bangs two particular facts, which confirmed her suspicions and led to a determination on her part to send her husband for the officers. The first circumstance is, that on Friday, when the boarder had his accomplice in the room, with the door locked, she called Mrs. Bangs' attention to the circumstance of the window shutters being partially closed; and the other that on Saturday, having discovered a small morocco trunk in his room, she mentioned the circumstance, and also, on perceiving the boarder going out with the same under his cloak, she told of it; that it was upon this, Mrs. Bangs immediately went to the room and finding the remaining trunks strapped, as if ready for removal, proceeded to take the measures already stated for their seizure. With respect to the first circumstance: the testimony fails entirely of proving she first discovered and gave information of the closing of the window shutters. Mrs. Bangs undoubtedly became aware of it, and it might have been from her own observation; and as to the latter the evidence is contradictory. One fact seems to be admitted, namely, that Maria Van Riper did mention to Mrs. Bangs sometime on Saturday of the boarder's having brought in a small morocco trunk which was then in the room; and if the witness Maria Smith be correct as to the conversation to which she testifies between Maria Van Riper and Mrs. Bangs, the inference is that the former did discover him going out with the small trunk and gave the latter information of it. This, too, is probable, from the circumstance of her serving him with tea in his room and thereby having an opportunity of observing his actions—added to the fact of his going out immediately after tea and about the time she naturally must have been engaged in removing the tea service. I am disposed to think it is true that Mrs. Bangs did derive her information from this servant of the robber's carrying out the small trunk and that upon this she was induced almost immediately to go up

stairs and reconnoitre the room and observe the remaining trunks. But there is nothing to show that this defendant gave the information with any intention, on her part, of inducing Mrs. Bangs to act upon it or of becoming a party, at all to the proceeding which might ensue. This I hold to be necessary, according to the principle which I have before laid down ; and here I think is the deficiency in this claimant's case. And so far from her acting in concert with Mrs. Bangs for the purpose of detecting the robber and discovering the stolen property with a view to the reward, the testimony of a number of witnesses shows she was incredulous on the subject and that the idea of benefitting herself, through the promised reward of the bank, could not have entered her mind. Her declarations and conduct, in several particulars, shew her to have been—like the boarders—a mere observer of the passing incidents of the week, with some curiosity excited in relation to the stranger, yet indifferent as to any result or as to any hope or expectation of sharing in the reward in case he proved to be the bank robber. Consequently, I cannot allow her now to participate.

The result of my opinion upon the whole case is that the exceptions taken to the master's report by the defendant Henry Bangs must be allowed ; and that those taken by the defendants Jacob Hays, Benjamin J. Hays and Zebulon Homan and by Maria Van Riper respectively be disallowed. The decree should be entered declaring the defendant Bangs entitled to the whole of the fund paid into Court by the complainants in the cause.

In expressing this opinion I do not mean to be understood as saying that the officers are not entitled to some compensation, besides what they may have received from the police department or the public for the time spent and the services performed at the request of Mr. Bangs in securing the money and arresting the felon. If they have any claim of this sort, as upon a *quantum meruit* (but about which it is not for me to express any opinion) it must be made against Mr. Bangs personally. But it gives them no title to the reward offered by the bank, nor any right specifically to the fund in Court.

With respect to the costs of this litigation : I think it is pro-

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per, under the circumstances, for each party to bear his own costs. The master's bill upon the reference forms a large item of the expenses of the suit as between the defendants; and each must pay such part of it as has been occasioned by the time occupied in the examination of witnesses and for drawing the depositions on their respective sides.

I apprehend it will not be difficult for the master to separate his bill accordingly.

PHILLIPS v. STAGG and GRAHAM.

SPENCER v. same parties.

A counsel in an action at law has no lien, upon the judgment recovered, for his fee in trying the cause; but the attorney has, for his taxable costs. Still, the lien of the latter will not go further than the costs in the identical action.

In order to constitute an equitable assignment of money by means of an order upon the person in whose hands it may be, the order should direct the payment out of a particular fund; and not generally out of any money to be received.

July 15th.
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*Costs.*  
*Lien.*  
*Equitable*  
*Assignment.*

Judgments at law had been obtained by the complainants respectively against the defendant Abraham Stagg. The latter had recovered a judgment against his co-defendant Graham, and the bills in the above causes were filed to prevent the same being collected by Stagg, but so that the amount of them might be applied in liquidation of the several debts due the complainants.

Prior to the recovery of the judgment against Graham, the defendant Abraham Stagg had given the following order upon the attorney he employed in the action:

" New York, February 22d. 1830.

" Dls. 303 75-100.

" Pay to Maturin Livingston or order  
 " three hundred and three dollars and seventy five cents,  
 " with interest, out of the first money belonging to me that

" may come into your possession from any law business of  
" mine and charge the same to the account of, your most  
" obedt. &c. Abraham Stagg."

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" To Samuel M. Fitch, Esq.

" Counsellor at law, New York."

Which order the attorney accepted, payable as therein expressed.

Underneath, was written: " Received the above, as a  
" collateral security for so much rent due to me and given  
" as such. M. Livingston."

The questions now for the Court were, as to the lien of the counsel and attorney, who tried the action against Graham, for their fees upon the judgment; and as to the right of Mr. Livingston to be paid out of it the amount of the above order.

Mr. C. S. Woodhull for the complainants.

Mr. Wm. Mitchell, for the defendant Stagg; and his law attorney and counsel.

Mr. J. Anthon, for the claimaint, Livingston.

THE VICE-CHANCELLOR.—The gentleman who acted as counsel for the defendant Abraham Stagg, in the action against Graham, has no lien for his counsel fee upon the money recovered. He cannot insist upon it merely because he performed the service.

But the attorney in the action has a lien for the taxable costs included in the judgment; and has a right to the same out of the money when received, in preference to the creditors of his client who have filed these creditor-bills: *Ex parte Moule*, 5 Madd. 462. And yet the attorney's lien is not to extend beyond the costs in this action. He cannot claim the amount of other costs due to him in other suits at law: *Lann v. Church*, 4 Madd. 391.

With respect to the claim of Mr. Livingston. The order which was given by Mr. Stagg upon his attorney Mr. Fitch is not an order upon this fund in particular: but it is, upon the first money belonging to him which should come into the



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possession of the latter from any law business of Stagg's ; and the acceptance was based upon this. It cannot be looked upon as an assignment of any part of the particular fund. For the purpose of constituting an equitable assignment, there must be an order or engagement to pay out of the particular fund: *Watson v. The Duke of Wellington*, 1. Russ. & M. 602.

If the money in question had come into the hands of Mr. Fitch before the complainants had filed their bills, then, there is no doubt, Mr. Livingston's right would have become perfect, and he could have recovered at law for money had and received against Mr. Fitch upon the principle to be found in *Weston v. Barker*, 12 J. R. 280. But, as that is not the case, the money is not to be considered as having been received for Livingston's use. His claim is necessarily put upon the ground of an equitable assignment, which cannot be supported: because, the order has no reference to this particular fund, the same being general and depending upon the event of money coming into the possession of Mr. Fitch.

The creditors are entitled to the money due from the defendant Graham on the judgments recovered against him, less the taxable costs due to Mr. Fitch's estate (he being dead) ; and an order may be entered, authorizing Graham to pay the same to the respective parties, pursuant to this decision, and that he be discharged from the effect of the judgment.

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LYON v. BROOKS.

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A defendant may set up matter in his answer which has occurred between the filing the bill and the putting in of such answer.

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September,  
1833.

Pleadings.  
Exceptions.

The bill was filed by one partner against another, praying an account and payment pursuant to the conditions of

an award to which they had both submitted. The defendant had put in his answer; but several exceptions for impertinence were taken to it; and the matter of these exceptions now came before the Court upon exception to the master's report. Two exceptions related to an agreement and payment set forth in the answer and which had occurred subsequent to the filing of the bill.

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THE VICE CHANCELLOR said: If there were any rule of equity pleading, by which a defendant is precluded from availing himself of matters arising between the filing of the bill and the answer, by way of avoidance or defence, there might be some ground for these exceptions. But there is not; and it certainly cannot be said that the matters set up are foreign to the case.

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BOKER and others v. CURTIS and others.

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A complainant who obtains an injunction to restrain a Sheriff from paying over the amount of a levy, must make the deposit or give the bond, required (by statute) in cases of staying proceedings at law.

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A bill was filed by the complainants, on behalf of themselves and other creditors, against their debtors Sidney Curtis and Cornelius L. Demarest, as co-partners, and persons who had obtained judgments against them by confession. These judgments were charged to have arisen upon individual debts, and not legally payable out of the co-partnership property in preference to the co-partnership debts. Curtis and Demarest had made an assignment; and therein gave a preference to the holders of these judgments. The sheriff had made a levy upon and sold the partnership effects in order to satisfy them; and the bill prayed for an injunction

September 16  
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Practice.  
Security up-  
on staying  
Sheriff.

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restraining the parties from interfering in the property and the sheriff from paying away or parting with the proceeds of the sale of the property and effects of the said Sidney Curtis and Cornelius L. Demarest to any person or persons. The injunction had been granted by the master, without any requirement in his *allocatur* of bond or deposit (as is necessary in cases staying proceedings at law : 2 R. S. 188.) A motion was now made to dissolve the injunction.

Mr. O. Gridley for the motion.

Mr. F. B. Cutting in opposition.

**THE VICE CHANCELLOR :—**In relation to a stay of proceedings at law after judgment, the statute requires that a sum, equal to the judgment and including costs, shall be deposited or a bond given, with sureties. And such a bond cannot be allowed by an injunction master : it must be sanctioned by the Court.

But, the counsel for the complainants contend that the present case is not embraced by the statute : inasmuch as it does not “ stay proceedings at law ”—the executions having been levied and the property sold, thereby terminating the legal acts. I examined this very point in the case of *Perry v. Hutchinson* ;(a) and decided against an injunction which had been similarly granted. I still hold to the opinion I there gave. The injunction against the sheriff certainly acts as a stay of proceedings at law : for the plaintiffs in the judgments can proceed to compel the sheriff to return the writs and pay over the amounts levied : this injunction stays such proceedings. It was therefore irregular without the deposit or security, and must be set aside with costs.

I have thought it right to look a little into this bill. There appears to me equity enough to consider it favorably. The case is one which would require the interposition of the Court, when properly applied for. Although I must set aside this injunction, yet I will give the complainants leave

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(a) 6th February 1833.

to file the necessary bond, instead of the deposit. They may do this any time to day ; and when done, a fresh injunction may issue pursuant to the prayer of the bill.

1833.

IN THE MAT-  
TER OF TIL-  
LOTSONS, IN-  
FANTS.

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In the matter of TILLOTSONS, Infants.

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Upon an application to appoint a special guardian for selling an infant's real estate, a part owner of the property and who is also a creditor against the infant's share, ought not to be appointed, however responsible and correct his general conduct may be. And if he should be appointed, his acts will be strictly scrutinized by the Court.

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Mr. *Davies* read a petition for the appointment of a special guardian. It was in the usual form ; with the injunction master's report of sufficiency, &c. But it appeared, that the party proposed as guardian was a part-owner with the infant in the property intended to be sold and was also a creditor against the infant's share.

September 24  
1833.

Practice.  
Guardian.

THE VICE-CHANCELLOR, from the character and responsibility of the person proposed, allowed the appointment : but intimated, that a person thus circumstanced ought not to apply for guardianship to sell ; and that the Court would be strict in scrutinizing his acts and accounts.

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MILNER

v.

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MILNER v. MILNER.

A complainant cannot file a supplemental bill to introduce facts which have occurred since the filing of the original bill and upon which a decree can be had without reference to the original bill. The complainant should dismiss his old bill and file an entirely new one.

October 7.
1833.

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*Practice.**Bill and supplemental bill.*

The bill was filed by the wife against the husband, in the month of June one thousand eight hundred and twenty-nine, for a divorce on the ground of adultery. Application was now made for leave to withdraw the replication (which had been put in after a supplemental bill) and to amend or be allowed to file a further supplemental bill: in order to set forth acts of adultery committed by the husband since the original bill was filed.

Mr. *W. N. Dyckman, Jun.* for the motion.

Mr. *B. Haight* for the defendant.

THE VICE-CHANCELLOR:—The question in my mind is, whether the complainant, upon her intending to rely upon the new facts, must not file an entirely new bill? I consider it not a case for amendment or a supplemental bill. The latter is generally filed to continue the original suit or is, in its matter, directly connected with it and because of the original bill being somewhat defective. But here, there is new substantive cause of action upon which a decree can be had without connecting it with the original bill. The complainant is here wanting to go entirely upon new ground. In fact, to make a new case. If this is to be done, it must be by a dismissal of the present bill and the filing of a new one.

I must refuse this motion.

Mr. *Dyckman* asked for leave to dismiss the original bill without costs : the application being in the alternative ; “ or for such other order,” &c.

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THE VICE-CHANCELLOR :—I cannot allow that, on the present motion ; nor do I think it can be done, without costs, at any time.

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THE NORTH AMERICAN COAL COMPANY v. DYETT and others.

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Where trustees are changed pending a suit against the trust fund, it is not absolutely necessary to bring them before the Court, although the complainants have a right to do so before a decree ; and in that case, supposing the cause to be at issue, it should be done by a supplemental bill.

When there is an alleged discovery of further testimony since the closing of proofs and a sufficient excuse is shown for not making the discovery earlier, the way to get it in is upon a special motion, and not by a supplemental bill. The latter is used to state new matter and not to set forth a mere discovery of further evidence.

A supplemental bill may be filed after publication is passed or proofs have been closed, in order to put proper new matter in issue. And if this be done, it will be irregular to examine witnesses to matters already in issue and not proved in the original cause.

An injunction is not necessary against new trustees appointed since the commencement of the cause. There is a sufficient notice of *lis pendens*. Parties moving for more than they were entitled to, ordered to pay costs of opposing motion.

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The original bill in this cause was filed against Joshua Dyett and Jesse Ann his wife, William Hamersley and William Chapman. This bill set forth (amongst other things) a settlement made on the marriage of the said Joshua Dyett and Jesse Ann, then Jessy Ann Hunt, and wherein William Hamersley and Michael Dyett were trustees. That William Chapman afterwards was a substituted trustee under it, in the place of Michael Dyett. That Hamersley and Chapman, as trustees under the marriage settlement, at the request of Dyett and with the concurrence of the said Mary Ann, purchased a factory or mill for spinning cotton and manufacturing cotton goods at Poughkeepsie ; and that

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Supplemental bill.  
Parties.  
Evidence.  
Injunction.  
Costs.

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it was made for the joint account of the trust estate and of Chapman. That the factory was carried on; and the complainants, at the request of Joshua Dyett, as an agent, delivered, at the said factory, seventy five tons of coal, of the value of four hundred and fifty dollars, which were used and consumed in or about the same. That there was fraudulent conduct, by the said Joshua and William Hamersley, in relation to the said establishment. That, in the month of April, one thousand eight hundred and thirty, the factory was sold by order of the Court of Chancery and the interest of the trust estate ceased; and they (the complainants) had frequently applied to the parties for payment of the amount due to them, but the same was refused. And the complainants prayed that an account might be taken of all the debts of the trust estate; and the trustees and the said Joshua and Jesse Ann be decreed to pay the complainants their amount.

The bill had been taken pro confesso against the defendant William Chapman; but answers were put in by Hamersley and Dyett and wife. The cause was at issue in the month of February one thousand eight hundred and thirty two; proofs were taken and an order was entered about the month of April, in the same year, closing the testimony; in the month of May following the cause was referred by the Chancellor to the decision of the Vice-Chancellor of the first circuit and had been regularly put on his calendar several times.

A motion was now made to file a supplemental bill. It was founded upon a notice as follows: "for leave to file the supplemental bill in the cause, with a copy whereof you are herewith served, and also that an injunction issue, upon filing the same, according to the prayer of the said bill, or for such other order as to the Court shall seem meet; and that the motion will be founded upon the bill and affidavit thereunto annexed, and further you will take notice that the pleadings and proofs in the cause will be referred to in support of the motion."

The complainants, in their proposed supplemental bill, alleged that since the entry of the order for closing the testimony, the said Joshua and Jesse Ann, with a view to place the trust estate out of the reach of creditors and within a week after the subpoena was issued, dismissed Hamersley

from the trusts; and substituted Henry W. Warner, Esquire, who was the counsel of the said Joshua and Jesse Ann; and that, subsequently, Murray Hoffman, Esquire, was appointed a trustee, in conjunction with Mr. Warner. And the complainants were advised it was necessary to make the said Henry W. Warner and Murray Hoffman parties to the suit. Also, that since the filing of the original bill, they had been informed and believed that Thomas L. Wells had been appointed a special trustee for the benefit of the said Joshua and Jesse Ann his wife; and that he held property for their benefit or for the benefit of their trustees. That, since the proofs had been closed, they had discovered testimony by which they would be enabled to prove that a portion of the coal purchased of them, as set forth in their original bill of complaint, had been sold for the benefit of the said trust estate and was so charged in the books of the said estate. Also, that the said Joshua was in the constant habit of making purchases of materials for the factory. And also, at the sale aforesaid, that the said Joshua purchased or pretended to purchase the said factory with the appurtenances, but they were ignorant as to its having been conveyed to him. That the value of all the trust estate was insufficient to discharge the debts against it; and that the rents and profits were not adequate to pay the interest annually accruing. And they were apprehensive the said Joshua and Jesse Ann, unless restrained, would again change the trustees; and ultimately place the same trust estate out of the reach of the complainants. Prayer, that the complainants and other creditors of the trust estate who should contribute to the suit might have such and the same relief as was prayed for in the original bill; and further relief; and that the said Joshua Dyett and Jesse Ann his wife might be restrained from changing or removing the present trustees, unless by order of the Court, and the said Henry W. Warner, Murray Hoffman and Thomas L. Wells be enjoined from paying over any part of the trust estate to the said Joshua and Jesse Ann or to any person for their use and benefit, &c. &c.

The affidavits which were read in opposition to the motion, detailed the progress of the suit, and explained how the

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counsel for the complainants must have been aware of the matters which were attempted to be got in by way of supplement, long before the present application was made.

Mr. *J. Blunt* for the motion.

Mr. *John A. Lott* and Mr. *Henry W. Warner* for the complainants.

October 28. THE VICE-CHANCELLOR:—I am inclined to the opinion that it is not indispensably necessary to make the substituted trustees, Messrs. Warner and Hoffman, parties to the suit, although, strictly speaking, the complainants have a right to bring them in before a decree is made in the cause; and as they were appointed trustees subsequent to the filing of the bill, a supplemental bill would be the proper medium for the purpose. There is not enough to warrant a supplemental bill for any other purpose.

As respects the trust in Thomas L. Wells. It is merely alleged that, since the filing of the original bill, the complainants have been informed and believe he has been appointed a special trustee of some other part of the real estate: not, that his appointment has been since made. The opposing affidavits show he was appointed long before the commencement of the suit. The complainants could, with ordinary attention, have made him a party to the bill in the first instance; and if this were not easy, they might afterwards, using due diligence, have offered a good excuse for the omission and, upon an application proper in other respects (it being the case of a sworn bill) have had leave to amend in this particular. They are now too late to obtain the benefit of an amendment; and it cannot be granted—more especially in this form: *Colclough v. Evans*, 4. Sim. 76.

Next, as to the alleged discovery of testimony since the proofs were closed. No excuse is shown for not making this discovery earlier; and if there were any thing offered to excuse the delay, this is not the mode of opening proofs in a cause with a view to the introduction of further testimony. An application should be made by way of special motion and not by supplemental bill. A bill of this descrip-

tion may be filed, after the publication is passed or proofs have been closed, for the purpose of putting such new matter in issue as is proper to be brought forward by way of supplement: *Usborne v. Baker*, 2. Mad. C. R. 379; and even when this is done, it will be irregular to examine witnesses to matters already in issue and not proved in the original cause: *Lube on Equity Pl.* 182, 183. The supplemental bill now presented does not state new matter to be put in issue: but only the discovery of further evidence in relation to matters already in issue. It is not admissible.

Then as to the charges made for the purpose of laying the foundation for an injunction. So far as it is prayed for to restrain the trustees from paying over and the *cestui qui trust* from receiving or using the rents and profits or income of the real estate in a manner consistent with the trust, it has been already decided in this cause that the complainants have no right to such an injunction; and even from the statements now made, in relation to the sufficiency of the trust estate in order to satisfy debts and incumbrances, I am not warranted in making a different decision. And so far as an injunction is prayed for to prevent another change of trustees *pendente lite*, it is altogether unnecessary. There is a sufficient notice of *lis pendens*; and the rights of the complainants cannot be affected by any change in this particular.

The complainants may have leave to file the supplemental bill for the mere purpose of making the present trustees, Warner and Hoffman, defendants in the suit. All other parts of such bill, alleged by way of supplement and calling for a discovery, must first be expunged, and the original defendants stricken out so as not to be obliged to answer. It is sufficient to exhibit it against the new trustees only. They will then answer, admitting themselves to be trustees; and the cause will stand for hearing upon the original pleadings and proofs and upon the supplemental bill and answer only. Nothing further is proper or necessary in this stage of the case: *Lube*, 180. 183. I have marked upon the margin the parts which are to be expunged from the bill and underscored the names which are to be stricken out.

As the complainants have brought the defendants here upon a motion for much more than they were entitled to

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and thereby put the defendants to the necessity of preparing affidavits in opposition, the complainants must pay the defendants their costs upon the motion.

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**HENRIQUES, Receiver, &c. v. HONE.(a)**


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Deeds or instruments brought within the statute against fraudulent conveyances are voidable only as to creditors or purchasers who impeach them and are not absolutely void. And when this is done in equity, the decree of the Court is interposed, and, by force of the statute, such decree declares the instrument void *ab initio* as respects those who impeach it and giving to them their legal diligence. But the court does not declare it void as to other persons, nor will it set the same aside as a nullity between the parties to the instrument.

In practice, it is usual to direct a release of the right of a party under a deed, which is set aside as constructively fraudulent. But it will not be necessary to direct a release or reconveyance where a deed is declared an absolute nullity from fraud or imposition in the manner of obtaining it, except under special circumstances and *ex abundanti cautela*.

M. made an assignment. Judgment creditors filed bills to set it aside. They succeeded; and a receiver was appointed. The assignees under the order of the court conveyed all the trust property and rights of M. to the receiver. Previously to the deed being set aside, one of the assignees had placed some of the trust property with H., an auctioneer, to be sold. The latter supposed the goods to be individual property of the assignee, and sold them in the usual way and rendered an account to the latter. Afterwards the receiver applied to H. for the avails and showed his authority. H. now finding the property had belonged to M., who was a creditor at large of his, in a larger amount than the avails of the sale, insisted upon retaining the money as part satisfaction of his debt: *Held*, that the receiver was to be considered *de jure*, as well as *de facto*, the assignee of the assignees and not of M. and entitled to the avails and decreed him to pay the same, with interest and costs.

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**Debtor and**  
**Creditor.**

A question of set off. On the eighth day of May, one thousand eight hundred and thirty-two, John Moffat made an assignment of his stock in trade, consisting of dry goods, to Messrs. Hall and, Swan, in trust for the benefit of his creditors; and upon certain conditions specified in the assignment. On the fourth day of June, one thousand eight hundred and thirty-two, Anthony Lenthilon and others, who

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(a) The decree in this case has been affirmed by the Chancellor; and the cause is now before the Court of Errors.

had recovered judgments at law against Moffat and issued executions (returned unsatisfied), filed a bill in this court against him and his assignees, to set aside the assignment as fraudulent, and to have the property applied to the payment of their judgments.

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By a decretal order made in the cause, on the twenty-eighth day of January one thousand eight hundred and thirty-three, the assignment was adjudged to be fraudulent and void as to those creditors; and a receiver was directed to be appointed. The case and the opinion of the court are reported in the first volume of these reports, p. 451.

The complainant, in the present suit, was the receiver appointed by the court; and Messrs. Hall and Swan were directed to assign and deliver over to him all the property, funds and effects mentioned in the assignment, with the proceeds thereof, and which he, the receiver, was to hold for the benefit as well of the complainants in that suit as of all other creditors who had acquired or might acquire a right to payment out of the property, but subject to such further order in relation thereto as the court might thereafter make. Pursuant to this order, Messrs. Hall and Swan executed an instrument of assignment on the eleventh day of March one thousand eight hundred and thirty-three to the receiver of all the property, estate, funds and effects mentioned in the original assignment of the eighth day of May one thousand eight hundred and thirty-two and of the proceeds thereof. Moffat was made a party to this instrument, and also executed it jointly with Hall and Swan. Previously to this time, *i. e.* on the first day of November one thousand eight hundred and thirty-two, while the suit was pending in this court, Mr. Swan, one of the assignees, had placed a parcel of the assigned goods into the hands of the defendant, Hone, as an auctioneer, to be sold. The defendant supposed the goods to be the property of Mr. Swan; he sold them at auction upon the usual terms, on the second day of the same November; and on the sixth of the said month rendered to Mr. Swan an account of the sales, showing the nett amount to be one thousand and sixty-eight dollars: but the proceeds he did not pay over. Afterwards, in the month of March one thousand eight hundred and thirty-three, the receiver

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called upon the defendant for the money and exhibited his title and authority as receiver, together with an order in writing from Mr. Swan. But the defendant being by this time informed of the goods having belonged to Moffat and that his assignment embracing these goods was set aside for the cause just mentioned, refused to pay over the proceeds and claimed a right to retain the money by way of part satisfaction against Moffat, who was indebted to him in about double that amount upon notes which Moffat had given to him and which were then past due.

Upon this state of facts, the general question was presented to the court: whether the defendant had a right to retain the amount of the sale by way of set-off?

Mr. *F. B. Cutting* for the complainant.

Mr. *W. Kent* for the defendant.

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THE VICE-CHANCELLOR;—The defendant, as against Messrs. Hall and Swan or either of them, could have no right of set-off at law or in equity. This is well settled. If they had merely been agents or factors of Moffat in placing the goods in the hands of the defendant for sale, the latter must have accounted to them; and in an action for the proceeds, founded upon the privity of contract, he could not have made a set off of the money owing to him by Moffat nor have availed himself of such indebtedness as an excuse for not paying over the full amount: *Toland v. Murray*, 18. J. R. 24. and in this court (3. J. C. R. 569.) is a decisive authority to this effect. Upon the same principle, if the receiver has succeeded to the rights of Messrs. Hall and Swan or derives title under them, it is equally certain there can be no set off: for, there being no equity of this sort as between the defendant and Hall and Swan, none can attach to and follow their transfer to him of the claim for the proceeds of the goods as a chose in action. Is there, then, any difficulty in considering the receiver as an assignee of Hall and Swan, standing in their place and having their rights against the defendant? This depends upon the effect of the fraud in the original assignment. If the character of this fraud was such

as to render the assignment utterly void from its creation and not merely voidable, then, no title passed under it—not even as between the parties to the same; but, upon its being set aside, the property would be regarded as having all the time belonged to Moffat and the title to which had never been changed. And, consequently, when taken possession of by the court and placed in charge of a receiver, the latter would be vested with a title proceeding immediately from Moffat (and, of course, subject to all equities existing against him in favor of third persons) and not mediately through assignees under a voidable assignment, which might operate to prevent any such equities from attaching. The courts, in carrying into effect the statute against fraudulent conveyances and giving to it a proper interpretation, have not felt warranted in proceeding upon any broader ground with respect to deeds or instruments brought within its provisions as fraudulent, than this: that they are voidable only as to creditors or purchasers who may think proper to impeach them and are not utterly void. Thus, as against a fraudulent grantor, the conveyance is effectual to pass the title and he and his representatives are not at liberty to set up a claim in opposition to the deed: *Osborn v. Moss*, 7. J. R. 161.; and for all the purposes of a valid title in a *bona fide* purchaser under a fraudulent grantee, such grantee is, in contemplation of law, vested with a legal and perfect estate. The entire interest and estate of a fraudulent grantor passes from him by such a conveyance: which would not be the case if it were a nullity—while the title must vest somewhere, for the law does not permit the fee to be in abeyance. It vests, by consequence, in the grantee, subject to be divested whenever the creditors or persons aggrieved think proper to call in question the validity of the transaction and show the deed or conveyance to be fraudulent. And when this is done, the judgment or decree of the court is interposed, and, by force of the statute, such judgment or decree declares the instrument to be void and void *in toto* as respects those who have impeached it and giving to them the benefit of their legal diligence. But the court does not declare it void as to other persons, nor will it set the same aside as a nullity between the parties to the instrument. It only acts

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upon it as a voidable deed : but not one as void *ab initio*. This principle clearly appears from the cases of *Anderson v. Roberts*, 18. J. R. 515. and *Mackie v. Cairns*, 5. Cow. 547. In the last case, one reason why the judgment, which had been confessed by the assignor to the assignees subsequent to the assignment, was held to be ineffectual for any purpose was, that the assignment, although fraudulent as to creditors, was valid as between the parties and, therefore, no lien could attach upon the property assigned by means of the judgment.

So, in *Murray v. Riggs*, 15. J. R. 571., where it was considered that a deed, fraudulent as to creditors, was nevertheless capable of confirmation and of being made good by subsequent acts between the grantor and grantees before any steps were taken to impeach it. This could only have been done upon the ground of the title having passed and vested in the grantee and of the deed being voidable only and not absolutely void : for an instrument utterly void and which never had any legal effect is incapable of confirmation.

Upon these principles, it appears to me impossible to consider the title to the assigned property as thrown back upon the assignor Moffat and as taking a new start from him, when the assignment to Hall and Swan was declared void as to the creditors who had taken measures to impeach it. The effect of the decree was only to divest the assignees of their right and control over the property by virtue of the assignment, so as to have the property applied to lawful purposes, namely, to the payment of the debts of the assignor owing to such of his creditors as did not choose to submit to his terms, but who pursued their legal remedies and thereby acquired preferences over others and priorities of payment out of his estate. And this court then takes the property under its own charge through the medium of its officer, a receiver, and appropriates it accordingly.

In practice it is usual to direct a release of the right of a party under a deed which is set aside as constructively fraudulent : *Dey v. Dunham*, 2. J. C. R. 194. But it would not be necessary to direct a release or reconveyance where a deed is declared an absolute nullity from fraud or imposition in the manner of obtaining it, except under spe-

cial circumstances and *ex abundanti cautela*: *Livingston v. Hubbs*, 2. J. C. R. 512. This distinction was taken by Lord Loughborough, in *Bates v. Graves*, 2. Ves. Jr. 294; and it appears to have been observed and acted upon in other cases. The practice upon a decree of requiring a release or conveyance by a person holding under a voidable deed upon setting it aside, shows the understanding to be that the legal title, at least, remains in him and does not return and revest in the original grantor. Hence, the propriety of requiring Messrs. Hall and Swan to execute to the receiver a release or transfer of the property and its proceeds. And I think it follows, as an inevitable conclusion, that the receiver must be deemed *de jure* as well as *de facto* the assignee of Hall and Swan and deriving title under and through them and not immediately from Moffat. The circumstance of his uniting with them in making such transfer does not vary the case. It was, as to him, a matter of form, provided the views I have already taken be correct.

But—supposing the title to the property to have reverted to Moffat and that the receiver takes it as coming directly from him and not through the medium of Hall and Swan, still, it appears to me there would yet be an insurmountable difficulty against allowing to the defendant the benefit of an equity which he now claims. He received the goods from Hall and Swan; and, as already shown, was primarily bound to pay over the proceeds to them. Now, as between Moffat and Hall and Swan, the assignment is still good. Neither of them are at liberty to invalidate it; and as respects the defendant himself, he has taken no steps towards setting it aside—nor is he in a position to attack the same, on account of not having obtained a judgment against his debtor. And so far from putting himself in the position of a judgment creditor, he appears to have been content to remain a creditor at large and to come in under the assignment for a dividend or dividends upon the terms which the debtor thought proper to prescribe. The defendant admits his never having disputed the validity of the assignment.

Although the assignment may be void as to creditors generally, legal measures are still necessary on their part in order to avoid it; and he who does not join or concur in

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proceedings for the purpose and takes no steps to place himself in a situation to receive a benefit from the debtor's property, except such as the latter chooses voluntarily to allow, must be deemed as acquiescing. So long as he does acquiesce he will be bound by any assignment or disposition the debtor may have made of his property and, for this reason, the assignment from Moffat to Hall and Swan may likewise be considered a valid assignment as respects the defendant Mr. Hone; and as a part of the assigned property has come to his hands to be disposed of for the purposes of the assignment, he cannot, in this collateral manner, set up a claim or right to retain the property or its proceeds in opposition to the title which it apparently confers.

If, upon any principle, Mr. Hone, as a creditor at large, has a right of retainer or set-off, then, clearly, Mr. Swan, who is also a creditor of Moffats', had the same right; and, as between them in relation to the particular sum in question, Mr. Swan would have the preference: because he was entitled to receive the money from Mr. Hone. Nor has Mr. Swan waived the right in favor of Mr. Hone. The order which he gave was for the payment of the money to the receiver; and not for the purpose of enabling him to compensate or set off the debt owing to him by Moffat against the proceeds of the goods in his hands. In no view of the case has the defendant any right to retain or make the set off.

There must be a decree for the payment of the one thousand and sixty-eight dollars, with interest and costs.

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THE EAGLE  
FIRE INS. CO.  
v.  
CAMMET.

THE EAGLE FIRE INSURANCE COMPANY v. CAMMET and  
others.

As a general rule, it is sufficient to bring before the Court the first person in being who has a vested estate of inheritance together with those claiming the prior interests and omitting those who may claim in remainder or reversion after such vested estate of inheritance. A decree against the party having that estate of inheritance will bind those in remainder or reversion or who, in any way, come afterwards; and they have a right of appeal from a decree made against the person having the prior estate. But there must be a clear tenancy in tail to dispense with the necessity of a remainder man being a party to a bill of foreclosure. If there be an express estate for life and it is doubtful whether the same person is also tenant in tail, the remainder man who has the first estate of inheritance ought to be a party.

M. C. mortgaged real estate; and died, after making his will. He thereby gave all his real and personal estate to his widow until second marriage or death; then to his daughter Mary as long as she lived; and if she had no heirs at her death, then to go to the children of J. C. Here, that the daughter Mary had only a life estate; and that on a bill foreclosure, the children of J. C. ought to have been made parties.

An application was made to compel John Bonsall to make good his purchase of premises which had been sold under a decree of this court in a foreclosure suit. The premises had been conveyed by the complainants to Moses Cammet and Amaziah Turner and a mortgage was given back for a part of the purchase money. Some months afterwards, Turner conveyed his undivided half-part to Moses Cammet. The latter made his will; and, died. By this will he gave as follows: "After all my just debts be paid and discharged, I give and bequeath unto my beloved wife, Cynthia Cammet, all my estate, both real and personal, of every kind and description, as long as she remains my widow; and at her death or marriage, to my daughter as long as she lives; and if she has no heirs at her death, it is to go to my brother John Cammet's children which lives in the town of Candy in the state of New Hampshire."

The complainants, in filing their bill of foreclosure, had only made Cynthia Cammet, the widow, Mary Cammet, her infant child, and Elisha Burrows, a judgment creditor, parties

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1833.  
Practice.  
Foreclosure.  
Party.  
Will.

1833. defendants. The purchaser declined taking the premises :  
 THE EAGLE because the children of John Cammet, who lived at Candy,  
 FIRE INS. CO. were not made parties.

v.

CAMMET.

Mr. *John Boyd* for the complainants.

Mr. ——— for the purchaser.

THE VICE-CHANCELLOR :—As a general rule it is sufficient to bring before the court the first person in being who has a vested estate of inheritance together with those claiming the prior interests (for instance, a tenant for life) and omitting those who may claim in remainder or reversion after such vested estate of inheritance : Mitf. 173. A decree against the party having that estate of inheritance will bind those in remainder or who in any way come afterwards ; and (in proof of this) they have a right of appeal from a decree made against the person having the prior estate : *Giffard v. Hort*, 1 Sch. & L. 386, 411. But there must be a clear tenancy in tail to dispense with the necessity of a remainder man being a party to a bill of foreclosure. If there be an express estate for life and it is doubtful whether the same person is also tenant in tail, the remainder man who has the first estate of inheritance ought to be a party : 3. Powell on Mort. 975, 976.

Here, the widow and daughter of the mortgagor are the only parties ; and they are both tenants for life only under the will. This is not sufficient. In *Gore v. Stackpole*, 1. Dow's P. R. 18., a foreclosure, in a similar case, was opened by a remainder man fifty years afterwards. It was done upon the opinions of Lords Redesdale and Eldon. In *Reynoldson v. Perkins*, Ambl. 564. the son to whom an estate of inheritance in the first instance was devised, was a party to the bill of foreclosure : and the sisters who claimed in remainder upon his death without issue were held to be barred.

It has occurred to me : whether the daughter Mary is not entitled to more than an estate for life under the will, in other words, whether an estate tail by implication is not given ? And if this should be the case, John Cammet's chil-

dren would not be necessary parties. But, on looking at *Lethieullier v. Tracy*, 3. Atk. 784., I am satisfied it is otherwise. The issue of Mary living at her death, if there should be any, will take as purchasers—and she has only a life estate.

The motion must be denied; and the purchaser be discharged from his contract, with costs.

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HENN  
v.  
WALSH.

HENN v. WALSH.

Mere dissatisfaction is not enough to authorize the filing of a bill by one partner for the dissolution of a co-partnership.

If there be any breach of covenants by one partner which, in its consequences, would be so important as to authorize the party complaining to call for a dissolution before the co-partnership could be dissolved by the efflux of time, the complainant may then have an injunction.

And to authorize the appointment of a receiver in a co-partnership suit, it must be such a case as would authorize a decree for a dissolution. Where a dissolution has already taken place or it is apparent that it will be decreed on the ground of some breach of duty or contract, a receiver will be appointed.

A receiver will not be appointed merely because partners quarrel.

Bill to dissolve the co-partnership and for an account. An injunction had been granted. The defendant put in his answer. Cross motions now came before the court: one, on the part of the complainant, for a receiver; and, the other, by the defendant, to dissolve the injunction.

Partnership.  
Injunction.  
Receiver.

The co-partnership had commenced on the first day of May one thousand eight hundred and thirty-three; and was to continue for five years. By the agreement between the co-partners, an inventory was to be made at the end of two years; and if either were then dissatisfied, he was to have liberty to dissolve the firm. The complainant had put into the concern the sum of one thousand dollars in cash, as his part of the capital; and the goods of the defendant, with fixtures belonging to him, were taken at a like sum, after allowing for debts which he owed.

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v.

WALSH.

The charges of misconduct in the bill were met and denied by the answer.

Mr. *F. B. Cutting* for the complainant,

Mr. *Nye Hall* for the defendant.

THE VICE-CHANCELLOR:—A partnership agreement, like any other, is binding upon the parties; and they must adhere to its terms. Neither partner is at liberty to recede from it against the will of the other, without a sufficient cause. Mere dissatisfaction by one partner will not justify him in filing a bill for a dissolution where, by their express agreement, it is to continue for a definite term; and this court will not interfere to dissolve the contract upon such ground. Here, there was a five years partnership, with the privilege of dissolving it at the end of two years. The complainant has become dissatisfied; and he makes various charges in his bill, showing *prima facie* cause enough for a dissolution before the stipulated time. But, his allegations are positively and fully denied in the answer. As the matter now stands, the complainant's case fails; and he would not be entitled, on the hearing, to a decree for a dissolution—consequently, not to an injunction or receiver in the mean time. If there be any breach of covenants by one partner which, in its consequences, would be so important as to authorise the party complaining to call for a dissolution before the co-partnership could be dissolved by the efflux of time, the complainant may then have an injunction: *Gow*, 185. There must be some actual abuse of the partnership property or of the rights of a co-partner and not a mere temptation to such abuse, which will induce this court to interfere; *Glassington v. Thwaites*, 1. S. & S. 124.

The same rules apply in respect to the appointment of a receiver. It must appear to be such a case as would authorise a decree for a dissolution: *Goodman v. Whitcomb*, 1. Jac. & W. 569; *Collyer*, 195, 196. In thus interposing, the court generally looks to the winding up of the affairs and not to the continuation of a trade under its authority. Where a dissolution has already taken place or it is apparent that it

will be decreed on the ground of some breach of duty or contract by one of the partners, there a receiver will be appointed. But if partners quarrel, a receiver will not be appointed merely on such an account, because it may not, of itself, be a sufficient ground for severing the connection between them. In the present case, the complainant produces affidavits to show a breach of the articles of the partnership by the defendants withdrawing more than the stipulated twenty-five dollars per month. The affidavits are not positive on the subject. They speak merely from what appears by entries in the books, coupled with what is believed; while, on the other hand, the denials of the defendant are positive. I cannot at present, in the face of all this, interfere. It may be an unfortunate connection which the complainant has formed. Still, he entered into it advisedly; and he must endure it until the contract allows of a withdrawal—unless he can overthrow the denials of the defendant by superior evidence.

The injunction must be dissolved; and the motion for a receiver denied.

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GARDNER
v.
DERING.

GARDNER v. DERING and others.

An omission in a decree of any matter which would have been inserted as a thing of course may be supplied on motion: but nothing more. And if any important error has occurred or any thing material has been omitted, a re-hearing should be asked.

Further directions are not given upon motion. They can only be had upon a hearing after a master's report or upon the cause coming on again for the purpose, in pursuance of a former order or decree. The Court can then add to the latter, but not so as to materially alter or vary the first decree.

An application will not be treated as one for a rehearing, unless it is apparently so, and made in due form and according to the settled practice of the Court.

Where a decree in a creditor's suit directed a master to take an account of a testator's personal estate, and the location, quantity and value of his realty (but did not, in terms, order any reference as to property which might have been converted from real into personal estate since the testator's decease); and, afterwards, the master was directed to sell the realty, and bring the amount into Court and at the same time to state such accounts as had not been taken under the first decree: It was held, that he could not go into the inquiry or compel the executrix to account for any timber or wood cut or sold after the death of the testator.

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1833.

Practice.
Decree.
Further directions.
Rehearing.

A motion to obtain further directions to a master or for a rehearing or other relief.

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GARDNER
v.
DERING.

On the twenty-third day of April one thousand eight hundred and twenty-seven, a decretal order had been made, wherein a master was directed to ascertain the account of personal estate of which a deceased testator was possessed or to which he was entitled at the time of his death and what amount remained in the hands of the defendant, Mrs. Esther Sarah Dering, as his executrix, unadministered. Also, that the personal estate, as before mentioned, (not, what should be or might have been converted from real into personal property by the executrix) be applied in the due course of administration, &c. and if insufficient to pay all the debts, then the complainant or any other creditors should be at liberty to apply on the foot of the decree for the sale of the real estate; and to this end, the master was first directed to ascertain and report the location, quantity and value of such real estate: but, nothing more. The decree did not take in any part of the real estate which the executrix might have converted into personalty.

The master reported upon the claims of creditors and the situation and probable value of the real estate.

Upon this report, the cause was heard for further directions: and on the eighth day of September one thousand eight hundred and twenty-seven a decretal order was made for the sale of the real estate, with a direction for the proceeds to be brought into court, while all questions, as to distribution, &c. were reserved until the master should make a further report; and he was also directed to proceed and state the accounts which had not then been taken or stated, as directed by the said decretal order of the twenty-third day of April. In proceeding to do so, the master decided that he could not go into the inquiry or compel the defendant, Mrs. Dering, to account for any timber or wood cut and sold subsequent to the death of the testator, because it was not embraced in the order.

Mr. *G. Griffin* and Mr. *W. N. Dyckman* for the present motion.

Mr. *D. Lord* contra.

THE VICE-CHANCELLOR:—I am inclined to think the court might, with propriety, have directed an inquiry as to any timber and trees cut and sold after the death of the testator and also an account of any thing belonging to the realty converted into money. But, the complainant does not appear to have asked for a decree to this extent, or, if he has done so, still the court has not granted it. I think the master has decided correctly in not compelling the required account from Mrs. Dering.

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v.
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The question then is, whether, upon the motion now made, the court can give the master authority to make such inquiry and compel such an account, by way of further directions? The court is asked to do this, either by adding to the order of reference heretofore granted or by making a new and separate order. But, it is manifest, neither can be done short of a hearing for further directions or a rehearing of the cause.

An omission in a decree of any matter which would have been inserted as a thing of course may be supplied on motion: *Wallis v. Thomas*, 7. Ves. 292; *Pickard v. Mattheson*, lb. 293; but I find no case in which the court has ever done more than this. "Further directions" are not given upon motion. They are only granted upon a hearing after a master's report or upon the cause coming on again for the purpose, in pursuance of a former order or decree. The court may then add to a decree: for instance, by allowing interest upon a sum reported by the master to be due: *Creuze v. Hunter*, 2. Ves. Jr. 164.; or by declaring what are the rights of parties as ascertained under the first order or decree and thus carry out and effectuate the object of the suit. But, upon a hearing for further directions on points or equity reserved, the court cannot materially alter or vary the first decree: *Parnell v. Price*, 14. Ves. 502.

If any error has occurred or any thing material has been omitted in a decree, which it is not perfectly a matter of course to correct or insert, then a rehearing should be asked. The case of *Brookfield v. Bradley*, 2. S. & S. 64. is strongly in point.

I am of opinion the court cannot, by way of further directions, amend the decretal order and thereby embrace the enquiry now sought to be made.

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v.
DERING.

Nor can I treat the present motion as an application for a rehearing. If the complainant is in time and has not, by his delay and apparent acquiescence in the decree of April, one thousand eight hundred and twenty-seven, lost or waived his right to a hearing, still the application should be made in due form and according to the established practice of the court. The *M. S.* order in *Stoughton v. Lynch*, before Chancellor Kent, to which I have been referred, was made upon a petition for a rehearing; and, this being granted, the cause was reheard (probably by consent) and the former decree was varied. This was according to the usual course; and it is not a precedent for deviating.

I cannot, at present, go into the merits of the complainant's claim for an account of timber and wood cut and sold after the death of the testator. The question is not properly before me. But it has been urged, that, inasmuch as the executrix has admitted, by the schedule annexed to her answer, the receipt of four hundred dollars as the net proceeds of wood sold, therefore the complainant ought to be permitted to surcharge or falsify as to such item: for the purpose of showing the amount to be much larger—and that the master should be instructed accordingly. If this money were the proceeds of wood severed and forming part of the personal estate at the time of the testator's death, then the complainant has already the privilege of disputing the correctness of the item under the general directions which have been given to the master to take and state the account of the personal estate; and in no other point of view, as the decretal order now stands, can the inquiry take place. If it be the proceeds of wood subsequently severed from the land, the complainant must take it as so much money voluntarily brought into the accounts and not liable to be questioned: unless he can obtain an alteration of the decree so far as to require her to account for the latter description of property, as well as for what was, in the first instance, personal estate.

Upon no principle can I interfere at present; and the motion must be denied, with costs.

1833.

TAYLOR
v.
TITUS.

TAYLOR v. TITUS and others.

A defendant is not allowed to file a supplemental answer for the purpose of setting up an important fact which has arisen since the filing of the original answer. He should file a bill in the nature of a supplemental bill.

The complainant had given a bond and mortgage to Samuel Titus and Amos Willets, two of the defendants; and afterwards sold the mortgaged property to the defendant Francis Graham, subject to such mortgage. The bill was filed to compel the defendants Titus and Willets to foreclose their said mortgage or to release and discharge the complainant from liability or that the defendant Francis Graham might be ordered and decreed to pay off and discharge the bond and mortgage. *Practice. Defendants setting up facts occurring after answer.* *Bill.*

A petition was now presented by Samuel Titus and Amos Willets, showing that the defendant Graham had (since the filing of the bill) paid off the mortgage; and praying for leave to put in a further and supplemental answer to the bill of complaint, setting forth the payment, satisfaction and extinguishment of the mortgage, with all attending circumstances.

Mr. C. O' Connor, for the motion.

Mr. F. Griffin, for the complainant.

THE VICE-CHANCELLOR:—It is not the practice to allow matter which has arisen after the filing of the original answer to come in under a supplemental answer. In cases where something has been overlooked or inadvertently left out the court, upon proper affidavits and on good cause shown, will give leave to a defendant to file a supplemental or further answer, instead of adding by amendment.

1833.

LEONARD
v.
JAMISON.

But here there is new matter which has arisen since the filing of the original answer. In such a case the defendant cannot set it up in a supplemental answer: he should file a bill in the nature of a supplemental cross bill. The practice is laid down in Mitf. Pl. p 72. 98. (last English and Amer. ed.)

Perhaps the complainant can be brought to admit at the hearing the fact now wished to be set up in a supplemental answer. If not, these defendants must adopt the other course.

LEONARD v. JAMISON and others.

Although the parties to an interpleader suit in this court live in different states, still, the cause will not, before the complainant is dismissed, be removed to a U. S. Court: a complainant in an interpleader bill being more than a nominal party.

October 14.
1833.

Jurisdiction.

The complainant had filed a bill of interpleader in relation to a promissory note transferred to the defendant Samuel Jamison, junior, by Solomon Johnson, another defendant. The complainant Leonard and three of the defendants, viz: James R. Whiting, Joseph N. Barnes and Cornelius Read, who were trustees of the estate of Solomon Johnson, an absent or absconding debtor, all resided within the State of New York.

Samuel Jamison, junior, was a resident of New Orleans. Solomon Johnson also lived within the State of Louisiana. Moses Allen, also made a defendant, resided in the city of New York.

The defendants Whiting, Barnes and Read claimed the amount of the promissory note as trustees of the creditors of Solomon Johnson; and the note had been sent to the defendant Allen by Jamison for collection.

The defendants Whiting, Read and Barnes had put in their answer.

The defendant, Samuel Jamison junior, now presented a petition, asking that the cause might be removed into the next circuit court of the United States to be held in and for the southern district of New York.

1833.
LEONARD
v.
JAMISON.

Mr. Jonathan Miller moved upon the petition.

Mr. Whiting opposed ; and cited the case of *Ward v. Arredondo*, 1. Paine's C. C. Rep. 410.

THE VICE-CHANCELLOR:—As between the complainant *October 15.* and the defendants, the present case comes within the principle laid down in *Ward v. Arredondo*. A decree in relation to the complainants right to file the bill is first to be made ; and, consequently, such complainant cannot be looked upon as a mere nominal party. He has no right in the matter in controversy : but still, there is something to be settled between him and the defendants before the latter can litigate together. Thus, if the defendants admit the right of the complainant to file the bill and set up no defence in opposition which requires the taking of testimony, the complainant files a replication and then sets down the cause for hearing and for a decree that they interplead and settle the matter between themselves ; and the court dismisses the complainant with his costs. This has got to be done, as I have said, before the defendants contest together. Suppose this cause were now removed : there must be proceedings between the complainant and the defendants ; and as some of the defendants are citizens of the same state with the complainant, the cause cannot be removed at present.

I must deny the motion.

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ROBINSON v. CROFSEY and others.

In order to determine whether a transaction amounts to a mortgage or a conditional sale : If the deed or conveyance be accompanied by a condition or matter of defeasance expressed in the deed or even contained in a separate instrument or exist merely in parol (let the consideration for it have been a pre-existing debt or a present advance of money to the grantor) the only enquiry necessary to be made is, whether the relation of debtor and creditor remains and a debt still subsists between the parties ? For, if it does, then the conveyance must be regarded as a security for the payment and be treated in all respects as a mortgage. On the other hand, where the debt forming the consideration for the conveyance is extinguished at the time by the express agreement of the parties or the money advanced is not paid by way of loan so as to constitute a debt and liability to repay it, but, by the terms of the agreement, the grantor has the privilege of refunding or not at his election, there it must be deemed purchase money and the transaction will be a sale upon condition, which the grantor will defeat only by a repurchase or performance of the condition on his part within the time limited for the purchase and in this way entitle himself to a reconveyance of the property.

Although equity will relieve against a penalty or forfeiture introduced for the purpose of security in a case where compensation can be made, yet, when it is not a question of penalty or forfeiture, but of a privilege conferred upon payment of money at a stated period, the privilege is lost if the money be not paid ; and the Court will not restore it to the party.

November 13
1833.

*Mortgage or
conditional
sale.
Relief
against for-
feitures.*

The bill in this cause was filed for the purpose of ascertaining the effect of certain articles of agreement entered into between the complainant, Alexander Robinson and one John Sharp, (since deceased) on the first day of May, one thousand eight hundred and nineteen ; and the question for the court was, whether a mortgage had been created or only a conditional sale had taken place ?

In the year one thousand eight hundred and seventeen, John Sharp was seized of a considerable real estate at Brooklyn, consisting, amongst other property, of eight lots of ground designated on a map by the numbers 277. 278. 279. and 280. fronting on Willow street, and numbers 281. 282. 283. and 284. adjoining in the rear and fronting on Columbia street. A large mansion house had been erected at the joint expense of Sharp and the complainant and was so placed that one half of it stood upon the lot No. 282. and the other half

upon No. 283. In order to vest a title in the complainant to one half of the house and four of the lots, John Sharp and Henrietta his wife executed to him a conveyance, dated the tenth day of December one thousand eight hundred and seventeen, for lots numbered 277. 278. 283. and 284. It contained full covenants against incumbrances ; and, a warranty. The consideration expressed in the deed was six thousand and five hundred dollars : but no money was paid at the time, because Sharp was then indebted to the complainant—and a future settlement of all accounts relating to the previous indebtedness and to the building of the house was then contemplated.

On the first day of May one thousand eight hundred and nineteen, Sharp was largely in arrear with the complainant ; and they then entered into an agreement, which was drawn up by Sharp, and executed under their hands and seals—to the purport and effect following ; Sharp agreed to convey to the complainant the whole of the house and eight lots, free from all incumbrance, except a mortgage previously given thereon to Jacob and John M. Hicks for one thousand dollars and interest from a certain day, which the complainant was to assume and from which he was to keep Sharp harmless, “ said sum of one thousand dollars being allowed by the party of “ the first part” (Sharp) “ out of the purchase money of said “ lots.” In consideration of which, the complainant agreed to cancel and give up a certain account-current signed by Sharp on or about the sixth day of July one thousand eight hundred and seventeen (the balance being three thousand two hundred and ninety-three dollars and eighty-one cents) and all interest due thereon ; also, to cancel, assign or to make void two bonds and mortgages executed by Sharp and his wife to the complainant in the year one thousand eight hundred and sixteen upon property at Williamsburgh and Newtown and then held by way of collateral security for a prior indebtedness, one bond and mortgage being for fifteen hundred dollars and the other for two thousand two hundred and fifty dollars, with all interest due thereon ; likewise, to assign, cancel or make over a mortgage given by one Hildreth for four thousand five hundred dollars, which covered four of the lots and other property owned by Sharp and

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all the interest due thereon, and which mortgage the complainant held by assignment from the mortgagee. All these things were to be completed without unnecessary delay. Sharp further agreed to lease to the complainant part of the ground near the mansion house, which he held under lease from Jacob and John M. Hicks, for nineteen years, at a ground rent of thirty-five dollars per annum and taxes. The agreement then concluded with the following clause: "the party of the second part," (the complainant) "hereby gives the party of the first part," (Sharp) "the privilege of re-deeming said house and lands within one year from this date for the sum of eight thousand five hundred dollars and any further money laid out of advantage to said house according to a certain account, and the mortgage to Jacob and John M. Hicks, without any further interest thereon, the rents being considered equivalent for any interest, to be the party's of the second part from the date of this."

Shortly after entering into this agreement, Sharp and wife, in fulfilment of it, executed another deed of conveyance in fee simple to the complainant of the remaining four lots, subject to the Hicks mortgage; and this deed, bearing date the first day of May one thousand eight hundred and nineteen, and the one previously executed under date of the tenth of December one thousand eight hundred and seventeen (and which deeds comprised the eight lots) were duly acknowledged by the grantors and recorded on or about the twentieth day of May one thousand eight hundred and nineteen.

The complainant, Alexander Robinson, entered into possession of the whole of the premises and had remained in possession ever since. Sharp resided within or in the neighborhood of the city of New York until his death, which occurred in the month of July one thousand eight hundred and twenty-four; and never offered to redeem or repurchase the property from the complainant. As respected the fulfilment of the complainant's part of the agreement of the first day of May one thousand eight hundred and nineteen, it appeared that he paid off the mortgage of one thousand dollars held by Jacob and John M. Hicks and caused it to be cancelled; and also cancelled and gave up the Hildreth mortgage, of

which he was an assignee, and thereby enabled Sharp to sell the other parts of the property which the latter mortgage covered, and out of which sales Sharp paid, in the year one thousand eight hundred and nineteen, to the complainant, for the purpose of liquidating outstanding bills incurred in building the mansion-house for which Sharp and the complainant were jointly liable, the sum of one thousand dollars. There was no proof of the complainants having ever given up or of his cancelling the account-current mentioned in the agreement; nor of his afterwards attempting to make any use of it as against Sharp or enforcing payment of the balance. Still, the mortgages upon the Williamsburgh and Newtown property he did not give up or cancel, but on the contrary, having been sued jointly with Sharp for a demand growing out of the building of the house (beyond what the one thousand dollars was intended to compensate) and a recovery being had and the amount of it paid by the complainant, he filed a bill in this court in the month of April one thousand eight hundred and twenty four in order to enforce the mortgages made upon the Williamsburgh and Newtown property and to be reimbursed. He alleged it to have been a part of the agreement of the first day of May one thousand eight hundred and nineteen—although omitted in the writing by mistake or through fraud of Sharp—that the mortgages were to remain for his indemnity against the demand thus put in suit. The cause came before the chancellor, who held, the mortgages were valid liens for the amount which the complainant had been obliged to pay; and his honor decreed a foreclosure and sale for the purpose of satisfying the same. The property was sold; and out of the proceeds the complainant was reimbursed.

The bill in the present cause was filed in the month of December one thousand eight hundred and twenty-seven. The defendants (except Edmund Kirby and Maria his wife,) were Henrietta the widow and Jane Sharp and others children of John Sharp deceased; while Kirby and wife were creditors by judgment recovered against Sharp in his life time.

The bill alleged that, notwithstanding the complainant intended and supposed himself to be contracting for a purchase

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of the property, subject to the right of Sharp to repurchase within one year and not after, yet he was then advised that the deeds of conveyance of the property, taken in connection with the agreement (which was an instrument under seal and recorded) might be deemed a mortgage and not a conditional sale, in which case the heirs and judgment creditors of Sharp would be entitled to redeem; and, although no right of redemption was set up, yet he was apprehensive lest, at some future day, such claim might arise, and was, consequently, desirous of having the nature and extent of his estate and interest in the property determined by the court. He prayed to have the agreement decreed to be one for a conditional sale; and, inasmuch as Sharp had not availed himself of the condition of repurchasing the property, that the estate and title of the complainant might be declared absolute and free from any lien, claim or equity of redemption by virtue of such agreement: or, if the conveyances, taken in connection with the agreement, made the estate and interest of the complainant a mortgage right only, then that an account might be taken and the defendants be decreed to redeem or be foreclosed and the premises sold to satisfy the amount which should be found due to the complainant, with costs of suit.

Mr. J. L. Mason and Mr. John Duer for the complainant.

Mr. C. F. Grim and Mr. Wood for the defendants.

March 11.
 1834.

THE VICE-CHANCELLOR:—I do not perceive, in the proceedings between the parties, any thing inconsistent with a purchase under the agreement of the first of May one thousand eight hundred and nineteen: provided the agreement itself and the circumstances of the case will admit of its being so considered.

The two mortgages were held by the complainant, at the time of entering into the agreement, as security collateral to the account current; and there is nothing incompatible with this, in the complainant's stipulation to give up the account current and the money due upon it as a part of the consideration for a purchase and to "assign, cancel or make

void" the mortgages so far as they were a security collateral to the account—nor in the agreement or stipulation on the part of Sharp, that the same mortgages should stand as a security for another purpose, namely, of protecting the complainant from loss in the event of an unfavorable termination of the suit at law commenced against them. The chancellor must have been satisfied, by evidence, of such being the understanding and intention of the parties or he could not have made the decree. The written agreement was set out in the answer of the widow, who was the principal defendant in that cause; and it was relied upon by her, (and claimed by the bill) as an agreement for the purchase of all the interest which her husband, John Sharp, had in the house and the eight lots of ground. And she insisted, as the deeds conveying the same had been executed, that the two mortgages and the account current ceased to be of any effect, except as part payment of the purchase money; and denied all knowledge of any agreement beyond what was contained in the written instrument. However they may have differed as to the extent of the agreement, it is obvious, from the pleadings, that the complainant and Mrs. Sharp considered a sale to be the result and the former a purchaser of the Brooklyn property and not a mere mortgagee by virtue of the agreement. Still, this does not, by any means, conclusively determine the character of the transaction. The court was not called upon to solve the point; and any admission or statement of Mrs. Sharp in her answer could not affect the rights of her then co-defendants, nor of those who are now in a similar position.

The question then is, upon the effect of the written agreement: whether, under the circumstances disclosed, it was a conditional sale or a mere mortgage transaction? If the former, the right to repurchase or open the sale is gone by lapse of time; but should it turn out to be a mortgage, then it is not too late for the defendants to be let in to redeem.

It does not become necessary to go into an examination of the numerous cases in the books where the question has arisen. There appears to me a marked test in all such cases. If the deed or conveyance be accompanied by a condition or matter of defeazance expressed in the deed or even contained

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in a separate instrument or exist merely in parol—let the consideration for it have been a pre-existing debt or a present advance of money to the grantor—the only enquiry necessary to be made is, whether the relation of debtor and creditor remains and a debt still subsists between the parties? For if it does, then the conveyance must be regarded as a security for the payment and be treated in all respects as a mortgage: *Slee v. Manhattan Company*, 1. Page's C. R. 56. On the other hand, where the debt forming the consideration for the conveyance is extinguished at the time by the express agreement of the parties or the money advanced is not paid by way of loan so as to constitute a debt and liability to repay it, but, by the terms of the agreement, the grantor has the privilege of refunding or not at his election, there it must be deemed purchase money and the transaction will be a sale upon condition, which the grantor can defeat only by a repurchase or performance of the condition on his part within the time limited for the purchase and in this way entitle himself to a reconveyance of the property.

All this is fairly deducible from the cases referred to upon the argument; and more particularly from *Goodman v. Grierson*, 2. B. & B. 274. There, Lord *Manners* held, that a fair criterion, by which to decide whether a deed be a mortgage or not was, by asking: are the remedies mutual and reciprocal and has the grantee all the remedies to which a mortgagee is entitled? And if, upon a sale under a decree for a foreclosure, the proceeds should prove insufficient to discharge the amount and there could be no remedy over for the deficiency upon any bond, covenant or implied assumpsit, he considered it as decisive in showing the transaction not a mortgage, but a conditional sale. And in *Conway's Executors v. Alexander*, 7. Cranch, 218., Chief Justice Marshall observes, "the enquiry must be, whether the contract, in the specific case, is a security for the repayment of money or an actual sale. If a security in the nature of a mortgage is intended, it is necessary that the mortgagee should have a remedy against the person of his debtor;—if this remedy really exists, its not being reserved in terms will not affect the case; but the remedy must exist, in order to justify a construction which overrules the express words of the instrument."

If we apply the principle contained in these decisions to the case in hand, it will not be difficult to arrive at a correct result. The agreement provides for cancelling the account current with the mortgages held as collateral to it, as well as the Hildreth mortgage. These matters were evidences of Sharp's indebtedness to the complainant; and the surrender of them formed a part of the consideration upon which the deeds were to be executed and delivered. The moment they were delivered, the account and the several mortgages ceased to be effectual in the hands of the complainant as general evidences of debt; they became extinct; a debt no longer existed; the same having been converted, by force of the agreement, into a payment of so much of the purchase money or satisfied by conveying the property to the complainant and vesting him with title and possession. In this point of view the transaction is to be regarded as a sale; and I am at a loss for sufficient grounds upon which to give it a different construction. There is nothing in the agreement or the facts of the case to show or from which to infer an intention to let the debt remain with a reciprocity of remedies as between mortgagor and mortgagee. The circumstance of the complainant's afterwards claiming to hold the two mortgages on the Williamsburgh and Newtown property for another and distinct purpose, under a verbal agreement which he succeeded in establishing, has been shown already not to be incompatible with the extinguishment of the debt for which those mortgages were originally intended as a security.

Then, as to what appears upon the face of the written agreement itself:—Sharp was to convey the house and eight lots to the complainant by deeds absolute, containing covenants for title and against all incumbrances, except the Hicks' mortgage; and the complainant was, not only to take the property subject to such mortgage, but, also to assume the payment of it at all events and keep Sharp harmless against his liability on account thereof.

This was certainly requiring from the complainant more than is ordinarily demanded from a person taking a mere mortgage security upon property already under hypothecation; and it goes far to show that the parties did not intend it to be a second mortgage. It is rendered still clearer that more than

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a mortgage security was intended, by the reason given in the agreement for the complainant's assuming the debt due to Hicks: "said sum of 1000. dollars being allowed to him by Sharp out of the purchase money of said lots." Thus expressly acknowledging the transaction to be a sale. They could use the words "purchase money" upon no other proper ground.

There is another feature of the agreement having a tendency to mark its character. I refer to the part whereby the complainant becomes a sub-lessee of a portion of the contiguous land for a term of nineteen years at a rent of thirty-five dollars per annum. It would hardly seem to be consistent with a mere mortgage interest in the complainant for him to bear this additional burthen. As a purchaser and with a view to a permanent enjoyment (and which the fact would indicate) he might be willing to do so; but not, if he were to hold the property only as security for a subsisting debt.

I think it is manifest, from this clause in the agreement that the parties intended a defeasible sale and not a mere mortgage. Nor is there any thing in the other parts of the writing at variance with this conclusion. The "privilege of redeeming" (within one year,) are words not necessarily confined to the case of a mortgage. They are equally applicable to a sale where the seller has secured the right of taking back the property upon a repurchase; and "redeem", "repurchase" and words of like import, may be used indiscriminately to convey the same meaning in transactions of this kind.

Then, as to the sums of money specified to be paid upon redeeming the house and lands. These are not mentioned as monies owing in the shape of a debt or demand which Sharp was liable or bound to discharge. The speaking of interest as being compensated by rents, does not necessarily show it to have been interest upon a subsisting debt: for it equally well applies to purchase money, provided such money was to be refunded. Judging of the transaction from what the parties have subscribed in writing for the purpose of making known their meaning, the whole appears to be a consistent act. It will bear no other safe construction than an intended defeasible sale, founded, partly, upon a pre-existing indebtedness which thereby became satisfied and extin-

guished : and not a mortgage to secure a subsisting debt. Extrinsic evidence and circumstances out of the written agreement have been relied upon, in argument on both sides, as elucidating the nature of the agreement and ascertaining its precise meaning. But, it is not necessary I should go into further particulars on this subject. They do not change the views already expressed.

One further point, however, remains to be noticed. It is contended, for the defendants, that even should this be considered a conditional sale and not a mortgage or security for a subsisting debt, yet a Court of Equity may relieve against a forfeiture for a breach in failing to repay the money in time, because compensation can be made, and, under the circumstances, such relief ought to be granted. It is a familiar head of Equity jurisdiction to relieve against a forfeiture or penalty, upon the principle of making compensation. But the present is not a case of forfeiture. The owner of the property, Mr. Sharp, sold his estate ; and there is no proof of the price having been inadequate. He made it a part of his contract—and I must presume the price was fixed with reference to the event—of having the privilege of redeeming, or, which is the same thing, repurchasing within one year by paying a certain amount of money. Time, consequently, was of the essence of the contract ; and performance necessary to regain the estate with which, by his voluntary contract, he had parted :—not that non-performance works a forfeiture and divests a title and estate already in him.

In such cases, equity does not interfere : because it would be varying the express terms of the contract and giving to the party a benefit of extension in point of time for which he has not stipulated. No fraud, accident or mistake is charged as a cause of his not having availed himself of the privilege within the time appointed. The true principle will be found in the recent case of *Davis v. Thomas*, 1. Russ. & M. 508., decided, in the first instance, by the master of the Rolls and afterwards upon an appeal by Lord Chancellor Brougham, and this case may be cited as having a strong bearing, in other respects, upon the present one. There, the plaintiff mortgaged an estate and then, in satisfaction of the mortgage debt and in consideration of an additional sum paid to him, re-

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leased to the defendant, the mortgagee, the equity of redemption. Some months afterwards the defendant demised to the plaintiff the premises, for a term of ninety nine years, at a certain rent ; and, upon the lease, stipulated that in case the latter paid the rent regularly, he should be at liberty, at any time within five years, to repurchase the premises at a specified price, but if default were made in payment of the rents at the stated periods, then the agreement was to be void. The plaintiff failed to pay the rents at the periods stated ; but, within the five years, he applied to repurchase and, at the same time, tendered the arrears. The defendant refused to permit the repurchase ; and the bill was then filed by the plaintiff to have the benefit of the stipulation or to be let in to redeem. Upon neither ground was the bill sustained. The mortgage no longer existed ; a right of redemption was gone. And with respect to the repurchase, it was held to be a privilege conferred upon him, provided he complied strictly with his contract ; and not having done so and as no fraud, surprise or accident was alleged, therefore he had lost the right. The principle of the decision upon the last point is this : that although the court will relieve against a penalty or forfeiture introduced for the purpose of security in a case where compensation can be made, yet, when it is not a question of penalty or forfeiture, but of a privilege conferred upon payment of money at a stated period, the privilege is lost if the money be not paid and the court will not restore it to the party. This is a sound rule.

I shall decree that the defendants, as the representatives of John Sharp or as standing in his place, have no right to redeem or repurchase under the agreement of the first day of May one thousand eight hundred and nineteen. This is all the complainant has asked for upon the hearing. I am of opinion he must pay the costs of the defendants in the present suit, saving, however, so much as may have accrued from the examination of Mrs. Sharp as a witness. The bill was filed for the complainant's ease and to quiet his own apprehensions. These defendants had not questioned or even threatened to impeach his title. I do not perceive there has been unnecessary litigation on their part. Several of them are infants. The bill is one of double aspect. It seeks an

alternative relief; the defendants had a right to point out and insist upon what was most favorable to them; and in doing so, although they have not succeeded, I am not disposed to leave them burthened with costs. There are instances of defendants setting up claims of right and failing, and yet are considered as entitled to costs against a complainant: *Beames on costs*, 94. and cases there; 2. *Chitty's Eq. Dig.* 933. (u); *Id.* 934. (w)

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v.
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WHITALL and wife v. CLARK and another.

A wife, having a power of appointment over personalty in a marriage settlement, may make a deed in favor of her husband, and the Court will carry it into effect: provided there has been no compulsion. But, in decreeing, the Court will refer it to a master to examine the wife privately, explain her rights to her, and ascertain whether she voluntarily consented and still consents to the deed.

Bill by husband and wife to carry into effect an appointment of the wife in favor of the husband, executed under a power contained in an ante-nuptial settlement. The defendants were the trustees of the settlement; and the property embraced by the deed of appointment (being the avails of real and personal property) had been reduced into cash and was in the possession of these trustees. The deed directed them to pay over to the husband, on his receipt in writing, all and singular the several sums of money in their hands belonging to the wife, for the sole and only use and behoof of the said husband.


December 3.
1833.

Husband
and wife.
Appointment
by the latter
in favor of
the former.

The defendants suggested the insolvency of the husband and of his being in debt; and that it was on this account the ante-nuptial settlement had been made.

Mr. John Anthon for the complainants.

This is an application by husband and wife, under an ap-

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pointment by the wife, for payment of the proceeds of the separate personal property of the wife, in the hands of trustees; to the husband, as appointee, on his own receipt and without a settlement.

I. Feme covert acting with respect to her separate personal property, is competent to act in all respects as if she were a feme sole. She has the complete property in it and may alienate it and all that arises from it in any manner she thinks proper: Clancy, p. 289. It has been settled since *Pettyplace v. Georges*, 1. Ves. Jr. 46, that when personal estate is actually given or settled to the separate use of a married woman, she may dispose of it as a feme sole: 2. Roper on Husband and Wife, 185.; *Peacock v. Monck*, 2. Vesey, Sen. 197. When the wife has an absolute interest, qualified only during the coverture on account of her condition as a married woman, since she has in such case a complete dominion over the property as if she were a single woman, the court will order it either to be paid or transferred to herself or to her husband, with her assent: 2. Roper, 225. If she file a bill praying that it may be transferred to the husband for his own use and benefit on his own personal security, the court will so order it: *Chesslyn v. Smith*, 8. Vesey, 185. If there be a trust for the separate use of a feme covert, with a power to her to appoint, but without any particular form of appointment, it appears that equity will so far consider her to have the absolute control over the subject of the trust as to uphold and enforce a disposition of it by her in any form in which she intimates an intention to that effect: Clancy, 294.

In Clancy c. 7. and in 1. Hov. notes to Vesey, p. 49., the cases are pretty well collected. Indeed, the wife's right to do what she pleases with her separate property is now so well established, that a reference to authorities is an act of supererogation. The only questions in such cases are: 1st. Whether she has by her deed an uncontrolled power and absolute right of property; and 2. Whether a settlement shall be first made. As to the first point. The perusal of the deed of settlement shews her right clearly absolute. The words are stronger perhaps than they are in any of the reported cases. On the second point, she may waive her equity to have a settlement; and

she has done so in this case, by the appointment and by the bill: *Sturges v. Corp*, 13. Vesey, Jr. 190. A reference to a master therefore to ascertain such assent is here unnecessary; and as the wants of the family are urgent, we pray an immediate decree to pay over, according to the terms of the appointment—the balance being ascertained and admitted.

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M. R. L. Schieffelin for the defendants.

I. By the answer of the defendants, trustees of Elizabeth Whitall, it appears that her husband James D. W. Whitall, is in embarrassed circumstances; and insolvent, and it appears by *Udall v. Kenny*, 3. Cowen R. 590., that even without an ante-nuptial settlement in trust, where the husband has shewn incapacity to manage his concerns or a disposition to squander his wife's property, the court will direct the interest to be paid to her or to her trustee for her benefit. The only way in which she can herself dispose of it is, by consent in court or out of it, on an adequate provision being made for her: *Same case*. Where the husband applies to a court of equity for the control of his wife's property, this court will protect her interests and make such a decree as is most for her benefit: *Fabre and wife v. Colden*, 1. Paige's C. R. 166. And though in this case now before the vice-chancellor, the bill is filed by both husband and wife, yet it is to be regarded as the sole application of the husband, she being under his control; and as to this doctrine see 1. Paige's C. R. p. 488., where a wife of a husband, addicted to intemperance, was refused as a guardian, "she being under his control." The rule that a feme covert is to be considered as a feme sole, as to her separate property, does not extend to transactions with her husband: 2. Vesey, 498. A wife is not capable of changing the nature of her estate, because she is under coverture: 2. *Atkyn's* R. 452. She cannot be deemed to have waived her equity by the bill, because a bill by a husband and wife, in her right, is the bill of the husband: 2. Vesey, 666. Husband suing for the wife's property must make a settlement: 2. Vesey, 562. The whole of the wife's fortune, though she were present and consenting,

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not paid to the husband, but only a part of it, the remainder being settled on the wife and family: 2. Vesey, 579. 672. In this case, the answer of the trustees alleges the insolvency of the husband; and this forms a stronger reason for a settlement on the wife, to prevent her from future want after being possessed of a fortune of, over thirteen thousand dollars. The said answer also states the amount of advances, made to the husband by the assent of the wife, and without such express assent; and claims a deduction of the amount of such advances, with interest, from whatever monies the court may order to be paid over to the husband or any new trustee. It also claims their allowances of commissions, costs and charges, and consents that a new trustee may be appointed, and the funds in their hands paid over.

As no fraud or improper conduct is alleged against the trustees, they are entitled to all of the above items; and they pray that, if a decree be granted, directing the payment of those funds, they may be authorized to deduct thereout their usual commissions, advances and interests, and their costs to be taxed. At the same time, although it would be a relief to them to be discharged from a trust of such continued trouble and pains, they deem it their duty to state, that the power and discretion of the court, so usually exercised for the protection of the property of infants, *femes covert*, and other persons under disability, could not be displayed to more beneficent purposes, than preserving, at least, a portion of the funds in question in this cause, by way of settlement for the wife and her family or by being paid into court to be invested for her and their benefit. As to the construction of the ante-nuptial agreement, and whether it authorises the *feme covert* to direct a conveyance to her husband, now that she is under his direction and control, the trustees submit themselves to the court, only premising that it was considered and intended by the parties, at the time of its execution, as an effectual preservative of her property, not only from the claims of her husband or his creditors, but even from the possible controlled change of opinion and desires of the *feme covert* herself.

Mr. J. Anthon in reply.

The learned counsel for the defendants has entirely misconceived the well settled law on this subject, which proceeds on the principle that where the wife holds personal property for her own use as a feme sole, she must have it with all its privileges and incidents, one of which is the absolute *jusdisponendi*: 2. Roper, 185. The property being her own, she may do with it what any other owner may and if they are laboring under family difficulties and embarrassments merely, it may be the very case in which the welfare of herself, her husband and children may most peremptorily demand its devotion, to the payment of debts and the setting the head of the family forth again in the world for the common benefit of the wife and children: 2. Roper, 232. The cases cited by the defendant's counsel are inapplicable. The only case from which he directly draws any position, viz: *Udall v. Kenny*, 3. Cow. 590. is totally dissimilar to this case. 1. The wife was an infant. 2. The husband had appointed her interest, she joining in the assignment. 3. This assignment was of a fraudulent character, and her act void. 4. The wife applied to rescind it, and have her equity. 5. The husband, a drunkard, &c.

There are other features which brought this case under the received principle that the wife has an equity to a settlement which she has a right to waive or to insist upon; and here she insisted on it. The other cases cited need no comment, the wife is not hostile in this case, but assenting, and anxious to use her property for the common benefit of her husband and herself. It is not a case for a settlement, the wife is of full age, and does not ask it. Such interference would not be a kindness to the family—she has confidence in her husband and chooses that he shall have her property with her person. It is true there is an allegation of the husband's insolvency in the answer, but it is equally true it is unfounded, and whether true or false it does not affect the case to the disadvantage of complainant's application. If there are embarrassments of a pecuniary character, then the money is the more needed. A reference to a master is only made to ascertain whether the wife acted without co-

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ercion, but when she joins in the bill this is unnecessary, the court makes the same decree upon the bill as in the case of any other person *sui juris* : *Essex v. Atkins*, 14. Ves. 542. ; *Allen v. Passworth*, 1. Ves. Senr. 163. We therefore pray a decree that the trustees pay over &c., pursuant to the appointment ; and we have no objection to the allowances they pray for, which we consider just, viz. 1. The money advanced with wife's assent. 2. The money advanced on the strength of this fund, without her assent. 3. Their commissions ; and 4. Their costs and charges.

April 21. **THE VICE CHANCELLOR** :—I am asked to give effect to an appointment by a married woman, in favour of her husband, executed by her under a power contained in a marriage settlement. The only question is, whether the court is bound to carry the appointment into effect, by decreeing the money to be made over to the husband ? There was formerly some doubt in the case.

When such cases first came before Lord Thurlow, he hesitated ; but upon an examination of authorities, he decided that although the deed might be direct to the husband, yet still the court would have to give effect to it. And since his time, such a deed has been declared to be valid : unless undue influence could appear. All the court can do is to watch such an act with jealousy ; and therefore, the utmost I can do is to throw around the transaction a scrutinizing guard, to ascertain if the deed has been fairly and voluntarily executed. Let the decree direct a reference to a master to examine the wife apart from the husband to ascertain, under what circumstances she executed the deed ; as also whether she still consents to its being carried into effect. The master will take care to inform the wife of her rights and to notify her that she may still dissent and the court will protect them if she requires it. If the master finds that the deed was duly executed and that the wife freely consents, then he may proceed to state an account of the amount in the hands of the trustees and upon the coming in and confirmation of the master's report the decree may be that the trustees pay over the monies to the husband, after deducting the charges and claims set up by them.

N. The following was the form of the decree, as settled by the court.

"It is ordered, adjudged and decreed, that it be referred to Frederick De Peyster, Esquire, one of the masters of this Court, to take proof as to the due execution of the deed or instrument of appointment mentioned in the pleadings in this cause as having been executed by the said Elizabeth Whitall (late Elizabeth Mc. Kie) in favour of her husband, James D. W. Whitall; and whether at the time of executing the same, she was of full age and not under any restraint; and that the said master ascertain, upon a private examination of the said Elizabeth apart from her said Husband, whether she executed the said instrument of appointment without any fear, threats or compulsion of her said husband, and whether she the said Elizabeth is still willing and freely consents that the money, in the hands of the defendants, as her trustees, be paid over to her said husband according to the said instrument. The said master first explaining to her, the said Elizabeth, the right which she has under and and by virtue of the ante-nuptial agreement to have the said fund remain in the hands of trustees or invested by order of this Court for her the said Elizabeth's sole and separate use. And it is further ordered, adjudged and decreed, that if the said master shall find the said deed of appointment to be well executed and that she the said Elizabeth consents as aforesaid, that then he proceed to take and state an account between the said Elizabeth and the said defendants of the trust fund in the hands of the said defendants; and that the said master, in taking such account, make all proper allowances to the said defendants for their legal commissions and for the sums advanced by them to the said Elizabeth and to her said husband out of or upon the credit of the said fund. And upon the coming in and confirmation of the said report, the said defendants pay to the said James D. W. Whitall on his own receipt such balance as shall be found due as aforesaid to the said Elizabeth, less the amount of the costs of this suit as hereinafter mentioned. And upon the refusal so to do that execution issue therefor. And it is further ordered, adjudged and decreed that the said defendants be, upon payment of the same to the said James

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"D. W. Whitall, discharged from their trust in the premises.
"And it is further ordered, adjudged and decreed, that out
"of the said fund, the costs and charges of the respective so-
"licitors for the complainants and defendants to be taxed be
"first paid by the said defendants."

ANN MARSH, widow and administratrix of David Marsh, Jr.
deceased v. WHEELER and another, executors of David
Marsh, Senr. deceased, *et al.*

A devisor may give to his devisee either land or the price of land at his pleasure; and the devisee must receive it in the quality in which it is given and cannot intercept the purpose of the devisor. If it be the purpose to give land to the devisee, the land will descend to his heir, and if it be the purpose of the devisor to give the price of land to the devisee, it will, like other money, be part of his personal estate.

If one of several devisees dies in the lifetime of the devisor and the heir of the devisee stands in his place, the purpose of a sale, for the convenience of a division, still remains and the share of the one dying will pass as money and not as land. But, in the event of all the devisees dying in the lifetime of the devisor, the purpose of a sale for the sake of a division, may no longer be applicable, and the heirs will take the whole interest as land.

When distinct legacies are given to individuals or an aggregate fund is directed to be divided among them in equal shares, without the benefit of survivorship, their interests are several and if any of them die before the shares are vested, what was intended for them will fall into the residue.

There are cases of a legacy lapsing where the party interested dies after the testator, provided it happen before the legacy is payable. But in order to have this effect, it must clearly appear that the time of payment is made the substance of the gift, and that the testator meant the time of payment to be the period when the legacy should vest; and if, in such case, the legatee happens to die before the time arrives, although after the testator's decease, the legacy necessarily falls. On the other hand, if the gift is immediate and the payment only is postponed to a future period (let it be of definite or uncertain duration and distinct from the gift) the legacy is vested and the death of the legatee after the testator will not defeat it.

If lands are devised or descend to the heir, charged with the payment of a pecuniary legacy to some third person, payable at a future day or upon some subsequent event, and the legatee happens to die before the time appointed for payment, the law favors the heir and considers the legacy lapsed.

The true rule with respect to the vesting of legacies payable out of real estate is this: where the gift is immediate but the payment postponed, it is contingent and will fail if the legatee dies before the time of payment arrives; but where the payment is postponed, in regard to the convenience of the person and the circumstances of the estate charged with the legacy and not on account of the age, condition or circumstances of the legatee, it will be vested and must be paid, although the legatee should die before the time of payment.

D. M. by his will, disposed of the residue of his estate as follows: "I will, order and direct all the rest, residue and remainder of my real and personal estate to be sold after the expiration of one year from the time of my decease. And I hereby authorize and empower my executors and executrix to sell and convey the said rest, residue and remainder

of my real estate accordingly. And as to the said residue of my personal estate and the proceeds of the sale thereof and the proceeds of the sale of the said rest, residue and remainder of my real estate, I give, devise and bequeath the same as follows, to each of my said daughters" (naming them) "the sum of \$500. and the residue thereof to my sons" (naming them) "to be equally divided between them share and share alike. And in case either of them shall have departed this life before me, leaving lawful issue, then his portion thereof to go to such issue." One of the sons died after the testator, leaving a widow but no children. The executors had sold the real estate and the proceeds of the personalty remained in their hands. Upon a bill filed by the widow of the deceased son: IT WAS HELD, that the share left to the latter was to be considered as personal estate, and that the legacy did not lapse, but would go to his widow and next of kin.

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David Marsh the elder, by his will, dated the thirteenth day *January 6.*
of June one thousand eight hundred and thirty-one, after di- *1834.*
recting payment of his debts and devising a house and lot of *Will.*
land to his daughters for life, with remainder in fee to his *Turning real*
grand-children, disposed of the residue of his estate in the *estate into*
following words: "I will, order and direct that all the rest, *personalty.*
residue and remainder of my real and personal estate be *Legacy.*
sold, after the expiration of one year from the time of my de-
cease. And I hereby authorize and empower my executors
and executrix to sell and convey the said rest, residue and
remainder of my real estate accordingly. And as to the said
residue of my personal estate and the proceeds of the sale
thereof, and the proceeds of the sale of the said rest, residue
and remainder of my real estate, I give, devise and bequeath
the same as follows, that is to say, to each of my said daugh-
ters, Maria, Ann and Eliza the sum of five hundred dollars
and the residue thereof to my sons Effingham W. Marsh,
David Marsh, Jr., Matthew Marsh and William Marsh, to
be equally divided between them share and share alike.
And in case either of them shall have departed this life be-
fore me, leaving lawful issue, then his portion thereof to go
to such issue." Then followed, by way of proviso, a power
to the executors, in their discretion, to lease from year to
year or for a term not exceeding three years a house and
lot on the corner of Houston street and the Bowery in the
city of New York (being a part of the real estate directed to
be sold) and to divide the rents equally between his before-
named sons; and with the same direction, in case either of
them should have died before him, leaving lawful issue, for

1833. the latter taking the share of the one so dying. He then appointed his daughter Maria and the defendants Andrew C. Marsh
 MARSH v. WHEELER. Wheeler and John Perrin his executrix and executors of his will.

The testator died on the twenty-ninth day of July, one thousand eight hundred and thirty-one, possessed of considerable real and personal estate. He left four sons and three daughters him surviving. But before the end of one year from his death and on the fifteenth day of July one thousand eight hundred and thirty-two, David Marsh the younger, one of the sons, died intestate, without issue and leaving the complainant his widow. She also had become his administratrix.

About a year and eight months after the death of the testator, the executors sold all the real estate which was directed to be so disposed of, saving one lot of ground. The proceeds of the personal estate remained in their hands.

The complainant, as the widow and administratrix of David Marsh the younger, claimed the proportion of the proceeds of real and personal estate which her husband would have been entitled to, if living; and she now filed her bill for an account and payment of it.

Mr. T. S. Brady for the complainant.

Mr. C. R. Disenway for the defendants.

April 21. THE VICE-CHANCELLOR:—The general question in this case is, whether the complainant, widow and administratrix of David Marsh the younger, is entitled to any share or portion of the estate of David Marsh the elder, and if so, how much?

The real estate is not devised to the executors, nor was the legal title vested in them by operation of law. And from not being expressly devised to any one, it descended to the heirs at law: subject to the power of sale conferred upon the executors. The power here given is a general one in trust, coming under the statute (1. R. S. 732. §. 77. 94.), and is imperative upon the grantees of the power (§. 96). It operates as an incumbrance; and when it is executed, the

same overreaches and divests the legal title and estate in the heirs. The power could not be executed until after the expiration of one year from the testator's death; but, the moment it was executed, the legal title passed to the purchaser and the purchase money became assets in the hands of the executors—like the proceeds of the personal estate and for the same general purposes. The obvious intention of the testator was to convert the whole of his real estate, with the exception of the house and lot devised to his daughters, into money, in order to have the proceeds taken as a part of his personal estate, to have them blended, and all disposed of together and as one fund in payment of debts and legacies of five hundred dollars apiece to the daughters and so as to have the remainder divided between the four sons as residuary legatees. The conversion here intended is a conversion "out and out;" and its effect is "to impress the real estate with the quality of money, so, that, after the testator's death, it shall be taken to have existed as money previously to his death and, therefore, be considered, to all intents and purposes, part of his general personal estate:" *Ram on Assets*, 206. The difference in the effect of conversions of this kind is fully explained by the author just quoted; and the doctrine may also be found in *Smith v. Claxton*, 4. Mad. 484. In this case, Sir John Leach, V. C., upon a review of all the cases, states certain general principles which admit of clear and decisive application in determining the effect of a conversion where the object and purpose of it, partially or wholly, fails. He observes, "a devisor may give to his devisee either land or the price of land at his pleasure; and the devisee must receive it in the quality in which it is given and cannot intercept the purpose of the devisor. If it be the purpose to give land to the devisee, the land will descend to his heir; and if it be the purpose of the devisor to give the price of land to the devisee, it will, like other money, be part of his personal estate." And he puts the case, where a testator directs his land to be sold and the produce divided between several, there the obvious purpose is that the sale is to be made for the convenience of division and they take their several interests as money and not land. So, if one, of several devisees, dies in the lifetime of the devisor

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and the heir stands in his place, the purpose of a sale, for the convenience of a division, still applies to the case in the event which has happened and the share of the one dying will pass as money and not land. But in the event of all the devisees dying in the lifetime of the devisor, the purpose of such a sale, in an event of the kind, could have no application to the case and the heir would, consequently, take the whole interest as land.

The same able judge, in the subsequent case of *Dixon v. Dawson*, 2. S. & S. 327. adhered to the principles stated by him in *Smith v. Claxton*, namely, that where the whole land is properly sold by trustees and there is only a partial disposition of the produce of the sale (owing, for instance, to the failure, by death, of a devisee to take) there the surplus belongs to the heir as money and not as land, (and on this point see *Green v. Jackson*, 5. Russ. 35.) In the case of *Dixon v. Dawson*, this point, amongst others, arose: The testatrix, at her death, left Philip Dixon her heir at law; and her real estate was sold by trustees in execution of the trusts of her will during the life time of this Philip Dixon. He died, however, before the trusts of the will were completed; and there being a surplus arising from the real estate beyond the particular purposes of the will, and which came to him as heir at law, the question was, whether it vested in him as land or money and belonged to his heir or personal representative. The vice-chancellor held, the surplus to belong to the personal representative.

I am entirely satisfied with the principle raised in these decisions and with the rules there laid down; and, applying them to the case now under consideration, it is plain that the share left to David Marsh the younger, whoever may be entitled to it, is to be regarded as personal estate. The sale directed by the will was obviously for the purpose of more conveniently effecting a division among the sons as well as for paying the legacies to the daughters; and this purpose remains applicable to the case whether all the sons be living or one of them be dead. I am of opinion the matter in controversy must be considered as money or personal estate in the hands of the executors; and, that, if any right vested in David Marsh the younger which can now be claimed under

him, it is a right to money and not to land : and, consequently, that it belongs to the personal representative and not to his heirs at law.

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This point being settled, I proceed to consider the next important question : whether the right of David Marsh the younger, as residuary legatee, was vested so as to pass, upon his death, to his personal representative or was contingent and merged in the estate ? I put the question in this way, because it is certain the share of David Marsh the younger did not go to the surviving brothers. The bequest is not to them in joint tenancy. There are no words of survivorship ; and when distinct legacies are given to individuals or an aggregate fund is directed to be divided among them in equal shares, their interests are several and if any of them die before the shares are vested, what was intended for them will fall into the residue : because the benefits intended for the deceased legatees are not given over to the survivors : *Page v. Page*, 2. P. Wms. 489. Hence, in the case of a joint tenancy, the death of one will not occasion a lapse, but, in the other, such an event, under certain circumstances, will defeat the legacy or share (of the deceased) in the aggregate fund.

Then, as to the question of lapse. The ordinary case in which it happens is, where the intended legatee dies before the testator and there is no express limitation or bequest over. In the present instance, the testator has undertaken to guard against a lapse which might happen by the death of either of his sons before him, by giving the shares over to their lawful issue, in case they had any. These events, however, have not happened. David died, without issue, after the testator. Still, there are cases of a lapse where the party interested dies after the testator, provided it happen before the legacy is payable. And yet to have this effect, it must clearly appear that the time of payment is made the substance of the gift and that the testator meant the time of payment to be the period when the legacy should vest ; and, in such a case, if the legatee happens to die before the time arrives, although after the testator's decease, the legacy necessarily fails. On the other hand, if the gift is immediate and the payment only is postponed to a future period (let it

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be of a definite or uncertain duration and distinct from the gift) the legacy is vested and the death of the legatee after the testator will not defeat it. This rule has been adopted by courts of equity and is established as a rule of construction in relation to legacies out of personal estate for the sake of preserving an uniformity of decision with the ecclesiastical courts over matters of which they have concurrent jurisdiction—the latter courts having borrowed it from the civil law. And, now, let us apply it to the present case.

There is certainly nothing in the will, so far as the personal estate is concerned (and I am now considering the personal estate apart from the proceeds of the real estate) but what admits of the construction of an immediate and absolute gift. The words are “and as to the said residue of my personal estate”—the testator having previously directed payment of debts and the personal estate being the primary fund for the purpose—“and the proceeds of the sale thereof”—having also previously directed a sale to take place after the expiration of a year—“I give, devise and bequeath”—in conjunction with the proceeds of the real estate—“the same as follows, &c.”: that is to say, the pecuniary legacies to his daughters and the residue to his sons in equal shares. The time appointed for the conversion of all the personal estate into money and for payment or a division of it amongst the legatees, is distinct from the gift. The testator was probably aware of the law allowing one year to elapse before executors can be required to pay legacies. The directions in the will, with regard to time, seem to have been intended for no other purpose than to impress more strongly upon the executors an observance of the duty which the law itself would impose. The time mentioned in the will, namely, one year from the death of the testator, amounts to no more than a direction as to the manner of raising and paying the legacies: and not of fixing the period for their vesting. The circumstance of the will's containing no provision against the lapse of any of the legacies in case of the dying of legatees after the testator and within a year, appears to me a strong indication of his intention to make the legacies vested ones: more especially as he has provided, to a certain extent, against the contingency of any

of his sons dying before him, and whereby their legacies would have been entirely disappointed.

In *Lowther v. Condon*, 2. Atk. 127. Lord Hardwicke placed great reliance upon such a circumstance in settling the construction of a will and determining the effect of a similar event.

I am satisfied upon this part of the case. A lapse has not taken place, so far as the proceeds of the personal estate is disposed of in legacies.

Is there, then, any distinction to be made in respect to the avails of the real estate? The rule with respect to the sinking of legacies charged upon and payable out of real estate is somewhat different; and there are cases where it has been held that a legacy, made up partly of personal estate and partly of money charged upon lands and to be raised out of the same, has, so far as regarded the personal estate, vested; and lapsed as to the part which was to come out of the realty. But, in no case has this been decided where the real estate was ordered to be sold and converted, out and out, into money and, as such, disposed of in legacies. Nor is there any reason for making the distinction or for applying the doctrine to cases like the present. It can only be where lands are devised or descend to the heir, charged with the payment of a pecuniary legacy to some third person, and payable at a future day or upon some subsequent event. In such a case, according to the general rule, if the legatee happen to die before the time appointed for payment, the law favors the heir and considers the legacy lapsed or merged in the inheritance.

The true rule with respect to the vesting of legacies payable out of real estate is this: where the gift is immediate but the payment is postponed until the legatee, for instance, attains the age of twenty-one years or marries, there, it is contingent and will fail if the legatee dies before the time of payment arrives: but where the payment is postponed, in regard to the convenience of the person and the circumstances of the estate charged with the legacy—and not on account of the age, condition or circumstances of the legatee—in such a case it will be vested and must be paid, although the legatee should die before the time of payment:

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1. Roper on Leg. ch. xi. ; *Birdsall v. Hewlett*, 1. Paige's C. R. 33. Whether the present case falls strictly within any part of this rule or is governed by it, I shall not particularly enquire ; but if it does, it must be within the last branch of it—and this is sufficient to show that, so far as legacies are payable out of the produce of the real estate, they are vested legacies. The gift is, of the proceeds of sale of the real estate ; and from the language of the will I consider it an immediate gift, which took effect upon the death of the testator. The time of payment was postponed for the convenience of the estate, in order that it might be sold at the time appointed by law for payment of legacies out of the personal estate. The object of the testator appears to have been, and it was a rational one, that the sale of the realty should be delayed and the payment of the legacies consequently postponed until the executors could be prepared with the general fund in their hands, arising from the whole of the testator's property, to pay over and make a final settlement with his children as legatees. There is nothing inconsistent in this view of the case, with vested legacies in each, from the time the will first took effect.

And besides this : considering the intention to convert the real property into personalty "out and out" and to give it in legacies as money, then it appears to me there is no other conclusion to be formed than the one to which I have arrived.

I must decree in favor of the complainant. She, as the personal representative of her husband, is entitled to an account of the whole of his share. After payment shall have been made of his debts (provided there be any) and the taking out her distributive share as widow under the statute, the residue will belong to her husband's next of kin, who are understood to be his brothers and sisters, parties defendants. It is right the costs of the suit, on both sides, should be borne and paid out of this share of the estate.

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RAY and others, executors of Ray, deceased v. MACOMB.

The Solicitor for a complainant should not be the Solicitor of a receiver in the cause.

This was a mortgage case ; and a receiver had been appointed. January 27. 1834.

He now petitioned that the tenants attorn and the defendant furnish a rental, &c. ; and the petition had the name of the same solicitor annexed to it as appeared for the complainants. An objection was taken to it on this ground ; and *Smith on Receivers*, p. 25. 26. was referred to. Practice. Receiver.

Mr. William H. Harison for the petitioner.

Mr. A. S. Garr in opposition.

THE VICE-CHANCELLOR :—I am inclined to uphold the objection taken to the motion. It is best for a receiver to employ any other solicitor than the one retained by the complainants ; but, as the point of practice is new in our courts, let the motion be denied without costs.

MOWER and wife v. KIP and others.

The old statute relating to the lien of judgments, and the provisions upon the same subject in the Revised Statutes, are substantially the same ; and under the old law, a senior judgment loses its lien at the expiration of ten years as to all judgments recovered or mortgages given in the mean time ; and after that period it becomes a junior judgment. A revival by *act. fa.* is of no effect to save it from the operation of the statute ; and it creates no new lien, except for the costs of the proceeding. Although a judgment be ten years old, yet, as to an assignment for the benefit of creditors

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made afterwards by the debtor, it retains its priority; the assignee not being a purchaser, nor the assignment an incumbrance within the meaning of the statute.

An old judgment which does not carry interest is not aided in that particular by a *sci. fa.* Neither at law nor in equity can interest, in ordinary cases, be computed upon a bond beyond the amount of the penalty. It cannot, therefore, be allowed where a mortgagee files a bill of foreclosure on a simple mortgage given with a bond confined to the payment of a specified sum and interest; yet, if the mortgagor file a bill to redeem, equity might act upon a different principle and not permit him to do so, unless he paid all the interest due, even though it might exceed the penalty of the bond. The penalty in a bond is looked upon as the debt.

February 4. The bill in this cause was filed in the month of February
1834. one thousand eight hundred and thirty-one for foreclosure and
a sale of mortgaged premises; but the important points in it
Scire facias. related to the priority of a judgment.
Bond.

In the year one thousand eight hundred and twelve, James J. Roosevelt recovered a judgment against Cornelius Kip, since deceased, for two thousand two hundred and seventy dollars and forty-nine cents, which was docketed on the first day of August in the same year.

On the twenty-seventh day of May one thousand eight hundred and thirteen, the said Cornelius Kip gave his bond to Mary ———, then a feme sole but now the wife of James B. Mower, in the penalty of three thousand and three hundred dollars, conditioned for the payment of one thousand six hundred and fifty dollars, with interest, on or before the first day of June thereafter; and in order to better secure the same, he, with his wife, Susan Kip, who was a defendant in the cause, executed the mortgage which was to be foreclosed. The mortgage was recorded on the sixth day of July one thousand eight hundred and thirteen.

Afterwards, Cornelius Kip became insolvent, and, upon obtaining the benefit of the insolvent act of this state and on or about the twenty-eighth day of February one thousand eight hundred and sixteen, he made an assignment of his estate for the benefit of his creditors—pursuant to the statute—to Samuel Jones, his assignee.

The insolvent died in the month of January one thousand eight hundred and twenty-two: but, previous to his death, James J. Roosevelt had revived the judgment against him by *scire facias* and issued an execution, which had been re-

turned unsatisfied. The judgment upon the *scire facias* was perfected on the nineteenth day of January one thousand eight hundred and twenty-one.

The lands, subject to the mortgage and judgment, had been sold under a provisional decree in this cause; and the proceeds remained, to abide a final decree. The amount was stated to be sufficient to satisfy both the mortgage and judgment; and, therefore, as between the complainants as mortgagees and the judgment creditor, it was not important which was preferred: but the question of priority was nevertheless material as affecting the surplus to which the right of dower of the widow of Cornelius Kip would attach.

The judgment, as it will be seen was originally the prior incumbrance; and the question to be decided was, whether it ceased to be a lien, at the expiration of ten years, so far as it ran against the mortgage of the complainants?

Mr. C. O'Connor for the complainants.

Mr. J. J. Roosevelt, Jr. for the judgment creditor.

Mr. D. S. Jones for the assignee, the widow, and the infant children of the mortgagor.

THE VICE-CHANCELLOR:—The mortgage in this suit was given less than a year after the judgment had been recovered; the latter then bound the land as a subsisting lien; and as this was known to the mortgagee, she must be considered as taking the mortgage subject to the judgment. Still, if the statute embraces the case, the mortgage would thereby be rendered secondary to the judgment for only ten years. This statute was first passed in the year one thousand eight hundred and eleven. It declared that all judgments thereafter rendered should cease to be a lien or incumbrance on any real estate, as against any *bona fide* purchasers or subsequent incumbrances by mortgage, judgment or otherwise, from and after ten years from the time the same should be docketed. It was reenacted in the revision of one thousand eight hundred and thirteen; and a provision to the same effect is contained in the present Revised Statutes—although

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differently expressed and rendered more clear. I am bound to look at the wording of the law as it originally stood. It is explicit. Judgments are to cease as liens from and after ten years from the time they are docketed: not, however, as to the debtors and their heirs—but only as against *bona fide* purchasers and subsequent incumbrances. The word “subsequent,” as here used, is susceptible of a two-fold application. It may so apply as to embrace those purchases or encumbrances created at any time after the judgment: and it may be limited to such and such only as are created after the expiration of the ten years spoken of by the statute. The latter construction is contended for by the counsel of the present judgment creditor. The question does not appear to have been distinctly raised in any reported case. It was not necessary to consider it either in *Little v. Harvey*, 9. Wend. 157. or in *Graff v. Kip*, 1. Edwards’ R. 619.; because, in those cases second incumbrances were not created until after the lapse of ten years from the first judgments. In this particular, the present case is different. But, in *Ex parte The Peru Iron Company*, 7. Cow. 540., there was abundant room for the question now presented. In that case, the subsequent judgments were all obtained within ten years of the first; and yet the learned counsel who argued there, appear to have treated them throughout as subsequent encumbrances against which the senior judgment ceased to be a lien at the expiration of the ten years from its date—the court too, it is clear, from the opinion delivered by the chief justice, likewise so considered them. The decision in this case appears to establish the principle that a senior judgment loses its lien at the expiration of ten years as to all judgments recovered in the meantime; and that it is necessarily postponed as to these and becomes a junior judgment as to them—which can only be upon the ground of “subsequent incumbrances” in the statute meaning all such as are subsequent to the judgment thus postponed: and not merely such as bear date subsequent to the expiration of ten years. This case occurred in one thousand eight hundred and twenty-seven; and I think it settles the true construction of the original statute upon the point now raised. The Revised Statutes, whether intended to introduce a new law or merely

to adopt the former provision according to its true sense and meaning are, at any rate, too explicit on the point to admit of a doubt. The words are, "as against incumbrances subsequent to such judgment;" and Mr. Justice Sutherland, in *Little v. Harvey*, supra, considered the two statutes substantially the same. He observed, it was "intended to operate like a statute of limitations, as an absolute bar upon judgments of more than ten years standing;" and he also remarked that if the party holding a judgment wishes to secure to himself the full benefit of it against the property of his debtor where other incumbrances intervene, he must not only sue out execution upon the judgment, "but the sale must take place within the ten years," unless he has been restrained by injunction, which the statute provides for. The revival by *scire facias* is of no effect to save the judgment from the operation of the statute. I am of opinion the judgment has lost its priority and is to be postponed to the complainant's mortgage.

The next question is, whether this judgment creditor is also to be postponed to the claim of the assignee under the insolvent act? I consider that he is not. Such an assignee is not a purchaser according to the general acceptance of the term. Nor is the assignment an incumbrance within the meaning of the statute. The assignee does not take in the character of a purchaser or as mortgagee or one having a lien or demand upon the property: but he takes the property itself. The statute under which the proceeding is had, operates as a *cessio bonorum* and the assignee is vested with both the legal and equitable title and estate of the debtor in trust for the creditors. He stands as a trustee of the whole property; and a trust results, in the first place, for the benefit of mortgagees and judgment creditors whose prior liens are preserved to them. It is expressly declared to be his duty to redeem all mortgages and satisfy all judgments: 1. Laws of N. Y. 1813. p. 408. §. 19. It would be contrary to every principle to permit the trustee to take advantage of the delay against his *cestui que trust*; and I think the statutory limitation to the liens of judgments could not have been intended to apply to such cases.

The next point made in relation to the judgment is, that,

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from the lapse of time, it must be presumed to have been paid and satisfied. At common law, the neglect or omission to act upon a judgment for twenty-years affords *prima facie* evidence of its having been satisfied; and the enforcement of it will not be allowed, until this presumption is repelled by proof of some acknowledgment of the existence of the debt within the last twenty years or the delay be satisfactorily explained: Matthews on Pres. Evid. 358. The circumstance of the debtor's representing the judgment in his schedule or list of debts in the year one thousand eight hundred and sixteen, on the occasion of his taking the benefit of the insolvent act, stated in the answer of Mr. Roosevelt, as also the subsequent revival of the judgment by *scire facias* and the issuing of an execution, are abundantly sufficient to place the judgment beyond the reach of the common law rule just stated. Nor does the presumption of payment yet arise as allowed by statute. The act on the subject was first passed April 3, 1821; and it was thereby declared that a presumption of payment should apply to all judgments in the same manner as to sealed instruments, that is to say, as to judgments rendered before the passing of the act, the presumption should apply after twenty years from its passing and to all future judgments after twenty years from their being docketed: Laws of 1821 p. 246. §. 4. A like provision, as to past judgments, is contained in 2. R. S. 301. §. 46.; and a similar provision is made by the section which follows in regard to future judgments. But, in no case can any presumption of payment arise under the statute before the year one thousand eight hundred and forty-one; and until then, if any judgment is to be affected by a presumption of payment, it must be a presumption of common law—and that I have shown is repelled in the present case.

It is also said, that even if the judgment remains due and unpaid, still interest cannot be allowed upon it in equity. This judgment is stated to have been entered up by confession, founded upon a promissory note given for money lent. It would, therefore, draw interest, although not a case within the act of 1813: 1. Laws N. Y. 506. §. 50. This act, which authorizes the collection of interest by execution, only extends the authority to executions issued upon judg-

ments thereafter to be recovered. In order to have a right to interest at law, an action of debt upon this judgment would be necessary; and in such an action, it is a matter of course to allow interest as an incident of the debt and to consider it a specialty claim which the statute of limitations will not bar. The case of *Sayre v. Austin*, 3. Wend. 496. went to this point. It was an action of debt on two judgments obtained in the year one thousand eight hundred and four and interest was allowed to be recovered by way of damages for detention of the debt for the whole period (upwards of twenty years) and to an amount far exceeding the principal sums. The law is the same in South Carolina: *Winslow v. Assignees of Ancrum*, 1. M'Cord's C. R. 104. Still, interest accruing upon judgments recovered previous to the law authorizing it to be collected on executions does not become a lien upon lands until it is included in a fresh judgment: 1. Hov. Suppl. to Vesey, Jr. 238. 239.; *Mason v. Sudam*, 2. J. C. R. 180.; *De La Vergne v. Evertson*, 1. Paige's C. R. 182. It is very different with respect to judgments recovered after the statute: for, by force of the authority to levy interest as well as principal, the former becomes equally with the latter a lien upon the lands from the time of rendition of the judgment. Hence, as I apprehend, arises the practice in our own Court of Chancery, of computing interest upon judgments which are sought to be satisfied out of surplus proceeds of mortgaged lands or out of the sales of real property under decrees and upon which realty the judgments were liens. Still, this can only apply to such of them as have been recovered since the thirteenth day of April one thousand eight hundred and thirteen. Judgments of a prior date have not the same effect and operation in respect to the matter of interest; and I am not aware that a subsequent revival by *scire facias* can give them such an effect. I have not seen the record of the judgment on *scire facias* in the present case: but it has been generally considered that the effect of a judgment on *scire facias* is not to create a new lien, except for the costs of the proceeding. Chief Justice Savage says, the effect of it is merely to make the execution regular: and not to change the nature of the lien as to the judgment itself: *Ex parte Peru Iron Company*, supra.

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It appears to me, therefore, that Mr. Roosevelt has no lien, by virtue of the judgment, beyond the principal sum due upon it.

The court cannot, upon any other ground, allow interest upon the judgment to be paid out of the fund, without prejudicing the rights of the assignee under the insolvent act—who is entitled to receive for the general benefit of creditors at large, all that may remain of the funds, after satisfying such demands as were liens and incumbrances upon the property prior to the assignment.

The next point is, as to the amount to which the complainants are entitled. The interest claimed by them, when added to the principal of their debt, swells the amount beyond the penalty of the bond; and the question is, whether they can be permitted to receive more than the penalty?

It may be considered as settled law, that a surety in a bond is not liable beyond the penalty. But, whether a recovery can be had against the principal obligor for a greater sum, is a question about which there has been a contrariety of opinion; and the weight of authority, at this day, appears to be that, in an action at law upon the bond, the recovery against the principal must be limited in like manner: *Clark v. Bush*, 3. Cow. 151. It would seem, from the report of the case of *Smedes v. Houghtailing*, 3. Caines' R. 48. (noticed in *Clark v. Bush*) that the Supreme Court then intended to adopt the rule broadly and generally that interest is recoverable beyond the penalty of a bond: but, on account of the expressions which fell from the chief justice, as reported, and what has dropped from succeeding judges of the same court and upon deliberate examination of all the other cases, it can hardly be deemed an authority to such an extent. Whatever fluctuation there may have been upon the subject, the matter is now settled in the law and equity courts of England. Interest cannot be computed beyond the amount of the penalty. The latter is considered the debt; and, consequently, it cannot be increased by any computation of principal with interest: *Mackworth v. Thomas*, 5. Ves. 329.; *Clark v. Seton*, 6. Ib. 411; 1. Coventry's Powell on Mort. 15. (n) and 355. (n), where all the cases are collected and arranged; see also Ram on Assets, 572. Special circumstan-

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ces are, however, sometimes admitted to take a case out of the general rule; and particular circumstances may occur to form an exception in the view of a court of equity and where this court will decree payment of interest or other sum of money beyond the penalty of a bond. This, for instance, may happen where a mortgage is taken in such a manner as to secure the payment, not of the money due on the bond, but of the sum for which it was given, together with all interest to accrue upon the same. The distinction is clearly exemplified in the case of *Clark v. Lord Abingdon*, 17.Ves. 106. Sir William Grant, who decided *Clark v. Seton*, also determined this case, where the creditor had two securities, one by bond and the other a mortgage. He remarked, if the creditor sues upon the bond, he cannot have interest beyond the penalty. But, it is to be observed, the mortgage there had been given to secure payment, not of the bond, but of the sum for which the bond was given, together with all interest which might grow due upon it: So that the same sum was differently secured by different instruments—in the one by a penalty and in the other, by a specific lien. The creditor could resort to either of them. If he went upon his mortgage, the penalty was out of the question. The Master of the Rolls, under the particular circumstances of the case, held, the whole of the interest to be recoverable, even though it might extend the debt beyond the limit of the other security, namely, beyond the penalty in the bond. By resorting to the mortgage and seeking payment of the principal and interest secured by it generally (and the mortgage not being confined to the payment of the money secured by the bond, which, in no event, could exceed the sum the obligor had bound himself to pay) all difficulty arising from the terms of the latter instrument was avoided. It is upon the ground of the penal sum mentioned in a bond being the stipulated recompense for its non-performance that the party who accepts it cannot be permitted to claim beyond such amount when he comes, either into a court of law or equity, for satisfaction of the bond itself. It follows, I think, that in foreclosing a mortgage given to secure the payment of a bond or the money to become due upon the bond, according to its terms and condition, payment to the amount of the

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appointed his widow, the complainant, Mrs. Ann C. Morris, executrix and the defendant an executor; and accompanied it with a bequest to the latter in these words:—"hereby giving my said executor ten thousand dollars for his care and trouble in executing that office." Two days afterwards he made a codicil, by which he empowered the executor and executrix to borrow money upon mortgage of the whole or any part of the real estate, in order to pay debts, contract for the sale of unimproved lands, and execute deeds to purchasers upon such contracts as well as upon contracts then existing and made by the testator or his agent.

The Testator died in the month of November, one thousand eight hundred and sixteen; and his widow proved the will, took out letters testamentary, and qualified as executrix sometime in February one thousand eight hundred and seventeen. The estate was large, consisting principally of wild or partially settled lands; and the testator's affairs were involved in much difficulty and embarrassment owing to heavy debts and responsibilities. The defendant Moss Kent, being apprehensive there would not be enough of the estate left, after paying the debts, to satisfy his legacy or to compensate him for the care and trouble which would attend the discharge of his duties, hesitated about taking upon himself the office of executor; and at one period, actually resolved not to undertake the trust—and he so informed the widow. This was about the time she qualified as executrix. In consequence of his not taking upon himself the trust, the executrix was under the necessity of appointing an agent to attend to the affairs of the estate; and for this purpose she employed a professional gentleman, who continued in such agency about the space of a year. He, during this time, rendered important services to the estate; and for which he was afterwards paid the sum of four thousand dollars. But in the month of November one thousand eight hundred and seventeen, Mrs. Morris became dissatisfied with this agent and she then earnestly entreated the defendant to act in the business of the estate, which he consented to do; and in May following he duly qualified as executor and took upon himself the active duties. He continued to discharge them down to the time of filing the bill, which took place in the

year one thousand eight hundred and twenty-nine—having received and disbursed a large amount of money on account of the estate and paid over various sums to the complainant, Mrs. Morris. A balance had remained in his hands, which he claimed a right to retain towards payment of the legacy of ten thousand dollars.

The bill was filed by the widow and son, who were principal devisees under the will of the testator, for an account; and they insisted upon the defendant's having no right to retain for the whole of his legacy. A reference, by consent, had been had to a master, to take and state the defendant's accounts and to enquire and report whether the defendant was entitled to the legacy of ten thousand dollars or to any and what part thereof and to any and what interest thereon. The master, in his report, allowed six thousand dollars to the defendant, being the balance of his legacy without any interest, after deducting the sum of four thousand dollars paid to the agent for services about the estate prior to the defendant's qualifying as executor or taking upon himself the office.

Two exceptions were taken by the defendant to the report: the *first*, because the master had not allowed him the whole sum of ten thousand dollars; and, the *second*, on account of the master not having allowed him interest upon the legacy from the time he qualified as executor until he was in the receipt of funds from the estate to satisfy it.

The cause now came before the court upon these exceptions.

Mr. *S. A. Foote* and Mr. *William Kent*, for the defendant and in support of the exceptions.

Mr. *Peter A. Jay* for the complainants.

THE VICE-CHANCELLOR:—The legacy is given to the defendant in his character of executor: it being expressly intended as a satisfaction for his care and trouble in executing the office. It is, therefore, a conditional legacy; and, according to the well-established rule in such cases, the defendant would not be entitled to claim payment without clo-

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thing himself with the character of executor or, in other words, without accepting the office and undertaking to discharge its duties, This, the defendant has done; but not without hesitation, besides the delay of more than a year and even a refusal, at one period, to qualify. Such refusal, however, was not an absolute renunciation. He was still at liberty to qualify; and when he, at length, consented and took upon himself the executorship, there is no doubt it was done in good faith, with a determination to perform the services which might be required of him and not merely for the purpose of putting himself in a situation to claim the legacy. But, if, upon admitting the will to probate, he had promptly taken the office, a heavy expense, which has been incurred by the employment of an agent or a considerable portion of it might have been saved to the estate; and there appears to be no other reason for his refusal or delay in this respect than the apprehended insolvency of the estate and the fear, on his part, of not being able to realize the legacy after the debts were paid. The employment of an agent, in the mean time, became necessary. Although the widow had qualified as executrix, still it could not be expected she should attend in person to the various negotiations and arrangements which the complicated affairs of the estate required in order to effect settlements. The testator probably foresaw the necessity of appointing a skilful and intelligent executor for these purposes and therefore nominated the defendant—at the same time providing for his remuneration. The like services which he was expected to render, have been performed in part by the agent, who, in this respect, may fairly be considered as substituted in the place of the executor for the time being.

The question then is, whether, under such circumstances, there should be a deduction from or an apportionment of the executor's legacy?

It must be admitted that where a specific sum is proposed as a compensation for an entire service and only a part is performed, it is but reasonable and just the reward should be apportioned to the extent of the service done. But it has been said, this principle of natural justice and equity is confined to matters of contract and does not apply as between

the testator and his executor in relation to a legacy for care and trouble, because such legacy is not a matter of convention or agreement, but proceeds from the mere bounty of the testator like any other legacy—that the executor is under no legal obligation to accept the office—he enters into no stipulation or agreement with his testator to this effect and may decline it if he chooses—and as the legacy is given to him in this capacity or is expressed to be for his care and trouble in executing the office, the law interposes no further than to attach to the gift an implied condition of his accepting the office, so that if the executor substantially complies with the condition, he becomes entitled to the bounty of the testator, and then there is to be no apportionment according to the degree of care and trouble or value and extent of services performed. All this, as general doctrine, is doubtless correct. A legacy to an executor even expressed to be for care and pains, is not to be regarded in the light of a debt or as founded in contract, or to be governed by the principles applicable to contracts. If it were so, an executor, who takes upon himself the office and discharges its duties, would be entitled to his legacy in preference to all other legacies even if there were a deficiency of assets to satisfy all of them. But, so far from it, the point has been repeatedly determined and it is now settled law—that a legatee of this description must abate equally with other legatees: *Butler v. Coot*, Nelson's C. R. 142.; *Herne v. Herne*, Barnard. 434. 435.; *Fretwell v. Stacy*, 2. Vern. 434.; *Attorney General v. Robins*, 2. P. Wms. 25.

The question, then, does not depend upon the effect of the provisions in the will, as creating a debt or constituting a contract. It is to be viewed in the light of a bequest upon condition of the services being rendered; coupled in this case, with a knowledge of their not having been entirely performed, although it may be that the condition has been substantially executed. When a legacy is given to a person in the character of executor, so as to attach this implied condition to it, the question generally has been upon the sufficient assumption of the character to entitle the party to the same. The cases establish the general rule that it will be a sufficient performance of the condition, if the legatee prove the will with a

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bona fide intention to act under it or unequivocally manifest an intention to act in the executorship, as, for instance, by giving directions about the funeral of the testator, but is prevented by death from further performing the duties of his office: *Reed v. Devaynes*, 2. Cox, 285; *Harrison v. Rowley*, 4. Ves. 212; 1. Roper on Legacies, 521.; *Williams on Executors*, 798. But, if an executor takes the office upon himself and, by his subsequent conduct, shows an intention not to execute the trusts but to use the office as a means for enabling him to violate the confidence reposed in him by the testator, he will not be entitled or permitted to receive his legacy: *Harford v. Browning*, 1. Cox, 302.

In none of the cases, however, has an abatement or apportionment, according to the services rendered, been made a question. They only go to the point of right, at first conditional but becoming absolute. The case of *Reed v. Devaynes*, supra, is much relied upon by the defendant's counsel as showing that the court will look no further than to see the right has become absolute by a bona fide acceptance of the office and that when this has been done, it will, although at a late day, allow the executor to receive his legacy. There, as the case is reported by Mr. Cox, the legacy was given in these words: "I appoint Devaynes and Smith, executors of my will, desiring them to accept of 100*l.* each as a mark of my gratitude for the friendship they have shown me." Smith claimed his legacy, although he had not proved the will; and said, in his answer, he never meant to prove it. Upon the first hearing of the case at the Rolls (3. Bro. C. C. 95.) it was held that he could not have his legacy without acting or, at least, proving the will; but after this decision and before the cause was brought on for further directions, he took out probate: and it was then thought he had sufficiently entitled himself to the legacy. It cannot but be observed, as to the case now under review, that, although the one hundred pounds was considered a gift to each of the persons as executors and, therefore, conditional, yet the legacies were not expressed to be for care and pains or by way of remuneration for services in executing the office, but, on the contrary, were intended as a mark of the testator's gratitude for past friendship. Nor was there any in-

timation or pretence of the estate's having been subjected to any loss or put to any expense by the delay or temporary refusal of the one executor to act and the other to perform all the services appertaining to the office. This decision can hardly be considered a precedent or authority for saying, that where a legacy to an executor is given in express terms for care and trouble in executing the office and to one of several executors and this one delays and, for a time, refuses to act whereby the estate is put to additional expense for services which the executor was expected to perform and for which the legacy was given, a court of equity should not interfere to lessen the amount of his legacy by charging him with what may fairly be considered the additional expense brought upon the estate by such his delay or refusal.

No case has fallen under my observation which goes so far as to deny the right of this court to interfere with the amount of a legacy in a special case of this sort; and I think the present does call for interference. No principle of law or equity will be violated. In *Harrison v. Rowley*, supra, the M. R., speaking of the general rule that an executor must clothe himself with the character of executor, in order to entitle himself to receive a legacy, remarks, "if there is any circumstance to show he was backward in undertaking the trust reposed in him, he shall not have it"—thus, clearly implying the executor must be prompt to act and that any unnecessary delay may be laid hold of by the court to deprive him entirely of his legacy. Now, if it be so, the court may certainly interpose as to a part of the bequest.

But, each case is attended by its own peculiar circumstances and must be determined accordingly. *Brydges v. Wotton*, 1. Ves. & B. 134., may be cited as an instance; and my decision can, perhaps, be considered as proceeding upon a new rule which has arisen from the peculiar circumstances or, rather, as forming an exception to the general rule which previous cases may have established.

I think the master has decided correctly, namely, that the defendant's legacy should be liable to a deduction by reason of the necessity to which his refusal, in the first instance, subjected the executrix of employing an agent and of the expense such agency occasioned. Still, I am not satisfied,

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from the testimony before me, that he ought to be charged with the whole sum of four thousand dollars. This amount was fixed by way of compromise of the agent's claim; and the defendant was not a party to the settlement. He is not, therefore, bound to adopt it; and it may have been an extravagant allowance or more than, by a suit at law, the agent could have received. I infer the master did not inquire into the value of the services performed by the agent which were within the province of the executor and could equally as well have been performed by the defendant in that capacity or discriminate between charges which the agent might have made for services as such and the claims he might make in his professional character for legal advice and, consequently, a proper subject for extra-charge. Hence it becomes necessary to send this matter back to a master in order to make such discrimination, provided the facts will warrant it, and to ascertain what portion of the amount which was paid to the agent is fairly chargeable for services rendered as agent which the executor might have performed; and in ascertaining, upon this principle, the sum to be deducted from the defendant's legacy, regard should be had to the amount of the latter and to the whole service which the executor was to perform, so that the allowance for the agent's services for the time he was employed and the importance of his acts may not appear disproportionate to the whole of the services which were expected of the executor for the compensation of ten thousand dollars. There may be some difficulty in arriving at such a result. I understand the testator's son is now of age; and I would suggest, for the consideration of the parties, the expediency of settling this amount by compromise.

The next question is, as to interest upon the defendant's legacy, from the time he qualified as executor until he was in the receipt of funds which he could apply in satisfaction of it. Although there is no express direction in the will as to the time of payment, yet, considering the nature and object of the legacy, I think the intention must have been to postpone the payment until the executor should be in funds. Where such an intention is manifest, it is tantamount to this in effect; and a direction postponing the payment to a given

time or to the happening of some event, prevents the allowance of any interest until such period arrives. Besides, upon the principle which appears in *Adams v. Gale*, 2. Atk. 106., Mr. Preston, in his treatise upon Legacies, 281., expresses an opinion that an executor is never entitled to interest on his legacy, because he has the power of paying himself if the assets be adequate; and in *Reed v. Devaynes*, before cited, although interest on the legacy to the executor is stated to have been waived, yet the M. R. remarked, he thought, under the circumstances of the case, the executor might not be entitled to interest, but he would not lay it down as a general rule—there might be a case where it would be proper. Upon the whole, I think the master has decided correctly in saying the defendant is not entitled to any interest upon his legacy.

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Debtors, who were in failing circumstances, assigned their estate to trustees for the benefit of creditors: 1. Upon trust to collect debts, &c; 2. To pay certain debts in full; 3. Upon trust, to pay, rateably as far as the proceeds would go, all other creditors who should, within 6. months, agree to release the debtors; 4. Upon trust, out of whatever should remain, to pay, rateably, such creditors as might not, within the 6. months agree, to give such release. And, in case none of the creditors referred to in the third and fourth trusts agreed to give such release within the period limited, then the assignees were to apply the proceeds, which remained after satisfying the trusts firstly and secondly expressed, to the payment, so far as they would extend, of all the creditors rateably. HELD to be fraudulent as against creditors.

The complainants were judgment creditors of Myer Levy February 17. 1834. and Ebenezer Henriques, who had made an assignment, on the twenty second day of November one thousand eight hundred and thirty two of their property to the defendants Solomon I. Joseph and——.

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A bill was now filed to overthrow the assignment as fraudulent on the ground of its trusts tending to delay, hinder or defraud creditors.



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A motion had been made (after the coming in of the answer) for a receiver; but in order the better to satisfy the mind of the court as to the goodness of the assignment, a second argument was now had.

The property assigned covered all the estate and property of which Myer Levy and Ebenezer Henriques had been possessed; and the trusts of the assignment were as follow: "Upon trust to sell and dispose of the said goods wares and merchandize, and to collect the said Book debts, promissory notes, claims and demands, and to convert the same into money. And out of the proceeds arising from the sales and collections thereof to pay, in the first place, all reasonable costs, charges and expenses of drawing these presents, and of making the sales of the said goods, wares and merchandize and of collecting the said notes, claims debts, and demands and all other reasonable costs, charges, and expenses attending the execution of the trusts declared and expressed in and by these presents. *Secondly, upon the further Trust*, out of the said proceeds, to pay and satisfy in full the debts set forth and mentioned in schedule A. hereunto annexed, or *pro rata*, in proportion to the amounts of the said several debts, in case the premises assigned should be insufficient to pay the same. And, *Thirdly*, to pay and satisfy all the debts mentioned and referred to in the schedule B. hereunto annexed, and the holders of the notes therein mentioned, and all other creditors of the said parties of the first part, whether named in the said schedule or not, who shall, within six calendar months from the date hereof, agree to release and discharge the said parties of the first part from all claims and demands in rateable proportions according to the amounts of their respective claims, so far as the said assigned premises shall extend. And, *Fourthly, upon the further Trust*, out of whatever shall thereafter remain of said proceeds, to pay and satisfy rateably, in proportion to the amount of their respective claims, all and every of the creditors of the said parties of the first part, and holders of their notes and responsibilities who may not, within the six calendar months, agree to give such release and discharge. And in case none of the creditors mentioned and referred to in the trusts herein thirdly and fourthly above expressed and declared, shall agree to give such

release and discharge as aforesaid within the period aforesaid, then the said parties of the second part shall appropriate and apply all the proceeds of the premises hereby assigned, which may remain after executing and satisfying the trusts herein above firstly and secondly expressed, to the payment and satisfaction, so far as the said proceeds may extend, of all the creditors of the said parties of the first part rateably in proportion to the amounts of the debts due to them respectively."

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Mr. R. Sedgwick and Mr. D. D. Field, in support of the motion, relied upon *Lentilhon v. Moffat*, see 1. vol. 451. and the (M. S.) cases of *Wakeman v. Grover and Gunn*, and *Burral Jr. v. Leslie*, both of which cases had been before the chancellor, and the former, afterwards, was taken to the court of errors. They will be found sufficiently referred to in the opinion of the court upon the present motion.

Mr. F. B. Cutting, for the assignees.

THE VICE-CHANCELLOR:—The provisions of the assignment made by the defendants Levy and Henriques are, simply, these: After providing for the law and other necessary expenses, the trustees are directed to pay certain creditors in full or *pro rata*, as far as the avails will extend; then, so far as the assigned property would go, to pay all other creditors equally who should, within six months, agree to discharge the assignors from all claims and demands; and, out of what should remain, to pay rateably the creditors who might not, within the six calendar months, agree to give such release and discharge; and, lastly, if such creditors should agree to give such release and discharge within the period aforesaid, then the trustees were to apply the proceeds which might remain, after executing the trusts first expressed (that is to say, the payment of the preferred debts) to the satisfaction, so far as they would extend, of all the creditors rateably. There is no ultimate disposition of a residue.

March 11,

The case of *Lentilhon v. Moffat* has been referred to upon the argument: but it will be found that I did not there ex-

1834.

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MILLS  
v.  
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press any decided opinion upon the effect of trusts like those embraced by the present assignment. The complainants place some reliance upon *Wakeman v. Grover and Gunn*. The assignment in that case contained trusts more objectionable than those now before the court. The counsel upon the present motion refer, however, to the decision in the court of Errors against the assignment in the case just mentioned upon the ground of its giving a preference upon the condition of the creditors granting an absolute discharge; but, I have not been furnished with a copy of the opinions in that court. (a)

Still I am relieved from all embarrassment by the decision of the chancellor in the later case of *Burrall, Jr. v. Leslie*, which has been decided since the case of *Wakeman v. Grover and Gunn* was passed upon in the court of Errors. He decreed against the assignment which the defendants John Leslie and Ross Leslie had made to the other defendants Williams and McDougald. And upon comparing the trusts of it with those which appear in the case now before me, I can perceive no difference between them. The trusts there were in the following words: "In trust for the sole and only uses and purposes following and on the conditions following, that is to say, that the said assignees shall take the immediate and full possession thereof; and shall dispose of the same; and collect the same in such manner and times as to them shall seem most advisable for the benefit of our said creditors. And, that the said assignees shall forward, by mail or otherwise, to each and all of the aforesaid creditors, as soon as may be, a notice of this assignment and objects; and shall, after deducting all reasonable expences and charges from the avails of this assignment, divide the balance or so much thereof as shall be necessary among those of the aforesaid creditors who shall, on or before the fifteenth day of December next, agree to receive such dividend, in full discharge and satisfaction of their respective debts. And if there should not be sufficient avails to fully pay the said last mentioned debts, then the said assignees shall divide the

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(a) At this time the report of the case (11. Wend. 187.) had not been published.

same among the aforesaid creditors who shall agree as aforesaid to take a dividend and discharge as aforesaid, in proportion to the respective amounts of their said debts. And should there be more avails, after deducting expences and charges as aforesaid, than to fully pay off all the debts of those creditors who shall come in for dividend and discharge their debts as aforesaid, then and in that case the said trustees, should there be enough, shall pay up all the debts to such creditors as do not come in for a dividend as aforesaid. And if there should not be enough for that purpose, shall then pay and divide the same among the said last mentioned creditors, in proportion to their respective debts. And if, after the payment of all expences and charges as aforesaid and all the debts of our creditors, there should yet be left a balance of avails from this assignment, that balance the said trustees shall pay over to us or our legal assigns."(b)

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MILLS  
v.  
LEVY.

(b) The chancellor gave no written opinion in the case of *Burrall Jr. v. Leslie*, but the following is a copy of the order directed to be entered :

" On looking into the bill of complaint in this cause and the answer of all the defendants, by which it appears that the complainants are creditors of the said John Leslie and Ross Leslie, and, before filing their bill in this cause, had obtained judgments and executions against the property of the said John Leslie and Ross Leslie; and that the said John Leslie and Ross Leslie had then avowed themselves insolvent and had assigned and delivered all their property and effects to the said other defendants Matthew Williams and Peter McDougald, in whose hands the said property and effects were at the time of the said executions of the complainants were delivered to the sheriff; and it further appearing to the court that, on filing the said bill of complaint, an injunction was issued and served, restraining the said defendants from disposing of any of the said property and effects or the avails thereof; and now, on motion, on behalf of the defendants, that the said injunction be dissolved; and on motion, on behalf of the complainants, that a receiver be appointed, with the usual powers; and after hearing Mr. Bushnell of counsel for the complainants and Mr. Stevens of counsel for the defendants; it appearing satisfactorily to the chancellor that the said John Leslie and Ross Leslie are insolvent and unable to pay their debts, and that the said assignment of their property and effects to the said other defendants Matthew Williams and Peter McDougald is fraudulent and void, it is thereupon ordered, that the said injunction be continued; and that a receiver be appointed, agreeably to the prayer of the said bill of complaint; and that it be referred to a master residing in the county of Onondaga to appoint a receiver, with the usual powers, and to take from him the requisite security. And that due notice be given to the parties in this suit, and to Timothy R.

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 MOAT  
 v.  
 HOLBEIN.

The chancellor must certainly have considered, in this case of *Burrall, Jr. v. Leslie*, that the court of Errors, in *Wakeman v. Grosvenor* and *Gunn*, had passed upon the principle involved in this mode of creating preferences and I also must decide against the validity of the present assignment. Let a reference be had to Master Codwise, for him to select a suitable person as receiver of the assigned estate and effects, with power to take the requisite security.

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MOAT v. HOLBEIN.

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While an injunction is in operation, a party ought to respect it, even though improperly issued.

No motion, made after the dissolution of such an injunction, for an attachment, on the ground of an infringement of it while in force, can be sustained.

A writ of injunction ought to be sufficiently explicit upon its face, by defining the property or matter enjoined, and so that a party may be thereby clearly advertised of what he is not to do.

March 10.  
 1834.

  
 Practice.  
 Injunction.

The bill (which was sworn to) contained no prayer for subpœna. An injunction had been issued, under the *allocation* of the master; and, served. The writ of injunction was loose in its terms. It directed the defendant to "desist and

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Green Esquire, solicitor for Samuel Matthews and John A. Ostrander, who are complainants in a creditor's bill in this court against said John Leslie and Ross Leslie, of the time and place when and where the said master will receive nominations and make the appointment of such receiver and determine upon and take such security. *And it is further ordered*, that the said defendants and each of them forthwith, after the appointment of such receiver, do and they are hereby directed to assign, transfer and deliver over to the receiver, on oath, under the direction of the master, all the said property and effects, heretofore assigned by the said John Leslie and Ross Leslie to the said Matthew Williams and Peter McDougald; and that they, the said defendants, appear before the master from time to time and produce such books and papers and submit to such examination as the master shall direct in relation to any matter which they might have been legally required to disclose by particular specification in this order. And that the master report to this court with all convenient speed.

refrain from selling, removing or disposing of any of the said partnership property or from collecting the partnership debts or other monies:" but contained no reference whatever to any particular firm or co-partnership business. After service of the injunction, the complainant's solicitor entered an *ex parte* order allowing his client to amend by adding to the bill a prayer for subpoena.

A motion had been made to dissolve the injunction, which was granted, with costs, but the amendment was permitted to stand.

An application was now made (after the dissolution) for an attachment for infringing the injunction while it was in operation.

Mr. ——— for the complainant.

Mr. C. O'Connor for the defendant.

**THE VICE CHANCELLOR:**—While an injunction is in operation, a party ought to respect it, even though the same may have been improperly issued: more particularly if it be connected with strong equitable circumstances. The case of *Partington v. Booth*, 3. Meriv. 148. is in point.

But I am strongly inclined to say, that no motion made after the dissolution of such an injunction for an attachment, on the ground of an infringement of it while in force, can be sustained.

There would be another ground for refusing the present application, even if what I have said were not sufficient. The injunction is not definite. It does not point out what particular partnership property is to be held sacred. A writ of injunction ought to be sufficiently explicit upon its face, by defining the property or matter enjoined, and so that a party may thereby be clearly advertised of what he is not to do. Motion denied.

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MOAT.  
v.  
HOLBEIN.

1834.

CAREY

v.

HATCH.

CAREY and another v. HATCH and others.

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The signature of counsel ought to appear to a bill on file ; and if it be not, the same is ground for a motion to take the bill off the files of the Court.

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March 11.

1834.

Practice.

Bill.

Signature of  
Counsel.

The bill had been sworn to ; and an injunction granted. After appearance, a copy of the bill was served. Neither the copy nor the original on file was signed with any counsel's name.

A motion, on this ground, was now made by one of the defendants to take the bill off the files or for such other order as the court might grant. An affidavit was made by the solicitor for this defendant, showing that the pleading was a sworn bill and that an injunction had been issued and served : and the notice of the motion was founded upon this affidavit, the bill on file and the copy served.

Mr. A. Williams for the motion, cited *Parkers' Chancery Pract.* 2. ; *Dillon v. Francis*, 1. Dick. 68. ; *French v. Dear*, 5. Ves. 547. ; *Kirkley v. Burton*, 5. Mad. C. R. 378.

Mr. O'Connor objected to the motion, on the ground of its not being competent to one defendant thus to dismiss a bill in which other defendants, who did not join in this motion, were interested ; and upon the point of counsel's signature referred to *Sears v. Hyer*, 1. Paige's C. R. 483.

THE VICE CHANCELLOR :—The notice in this case must be deemed sufficient. It was enough to apprise the complainant's solicitor. And I have no doubt that any one defendant may bring the present question before the court.

It was my understanding of the practice at the time, I

was at the bar and has been since, that the signature of counsel is necessary to all bills as well as answers. And experience has taught me the propriety of requiring it. The younger members of the profession are too neglectful in asking aid of counsel in preparing their pleadings. If they were more studious of this, the time of the court would be often very much saved and its records appear to more advantage. And I must also add, that even counsel are not careful enough with their signature. They sometimes sign pleadings which I have been inclined to think they have never read.

The question now before the court may be considered as having come up incidentally before the chancellor in *Rogers v. Rogers*, 2. Paige's C. R. 458. The case involved important questions in relation to the taxation of costs.

1834.

CAREY  
v.  
HATCH.

And see *Doe v. Green*, 2. Paige's C. R. 347.

The chancellor there shows the propriety and even necessity of having the signature of counsel to all bills, (whether sworn to or not.) And the same thing is evidently recognized by him again in *Littlejohn v. Munn*, 3. Paige's C. R. 280.: although, it is true, that the copy of the bill there served was wanting in more particulars than the present one. The chancellor mentions the signature of counsel as being necessary upon the copy to be served: and thus shows it ought to appear upon the original on file.

The complainant's solicitor has given, by affidavit, some excuse for the omission. He states that counsel was retained and perused the bill and that the solicitor went to the office of the former for his signature, but did not find him. I do not know whether, under these circumstances, it will be right to have the bill struck off the files of the court; although I hold a motion to that effect may be sustained in an ordinary case. My inclination is to permit the counsel for the complainants to sign his name now to the bill.

The matter is then reduced to a question of costs. These were given in the case of *Littlejohn v. Munn*. There is the same reason here; and this defendant is entitled to the costs of the motion and the entry of the order consequent thereon.



1834.

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POOL

v.

POOL.

POOL v. POOL.

In suits for separation, where the complainant proves his or her case, the form of the decretal order settled by chancellor Kent is to be used.

March 15.

1834.

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*Practice.**Decretal or.**der.**Separation.*

A suit for limited divorce; the case was proved; and the solicitor for the complainant brought the draft of the proposed decree for the approval of the vice-chancellor: when His HONOR required it should be made conformable to the decretal order which appears in the printed report of *Barrere v. Barrere*, 4. J. C. R. 187. and suggested its being a desirable form to be used in all similar cases.

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## PALMER v. VAN DOREN.

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A complainant cannot examine a sole defendant as a witness against himself; because no decree can be had against a party defendant upon facts to which he is examined as a witness.

If there be more defendants than one, an examination of a defendant may be had; and you may get a decree against another defendant upon such facts; but you cannot have a decree against the party examined embracing such facts.

Where a defendant has been examined, under the usual order as a witness, a complainant may have a decree against him upon other matters to which he was not examined.

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March 25.

1834.

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*Practice.**Examining
defendant as
a witness.*

The bill was filed by the complainant, John W. Palmer, as a judgment creditor, whose execution had been returned *nulla bona*, against the defendant John L. Van Doren.

A motion was now made "that the defendant be examined as a witness for the complainant, under such restrictions

as the court might think proper to impose;" and for other relief. This motion was based upon an affidavit made by the complainant, wherein he deposed that the defendant was in possession and receipt of a large income; that it was material to the deponent, as he was advised by counsel and believed that the defendant should be examined as a witness for the deponent in the case; and he was further advised and believed that unless the said defendant was examined as a witness to make certain disclosures relative to his said income and property so held in trust or possession or in trust by others for his use, it would be impossible to furnish the necessary proof to enable this court to do equity between the parties. And further, that he had understood from his counsel and believed, a rule to produce witnesses had been entered and he had been applied to for a list of his witnesses, but he could not furnish such a list, unless the defendant should have first been examined, inasmuch as no clue was given by the answer of the defendant to the facts which the deponent believed existed or to the witnesses by whom he should be enabled to furnish the necessary proof; and it was his belief (and he was so advised) that unless such directions as to the witnesses and facts were furnished somehow by the defendant, injustice must be done to the deponent.

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PALMER
v.

VAN DOREN.

It appeared by counter affidavits, that the complainant had taken exceptions to a first, second and third answer—the last of which was decided to be sufficient.

Mr. *D. Graham, Jr.* for the motion.

Mr. *D. E. Wheeler* in opposition.

THE VICE-CHANCELLOR:—This is an application to examine a sole defendant in a cause. It is attempted to be founded upon two points: 1. That certain disclosures, relative to the defendant's income and property, are necessary, before the complainant can furnish his proof; and 2. That as no clue is given, by the answers of the defendant, to the facts which the deponent believes to exist, therefore (and until after an explanation of these) the complainant cannot give a list of his witnesses.

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PALMER

v.

VAN DOREN.

Upon the opening of this motion, I considered it to be a novel one; because, as Van Doren is the only defendant, an examination of this person would be a bar to a decree. There can be no decree against a defendant upon facts to which you examine him as a witness. If there be more defendants than one, an examination of a defendant may be had; and you may get a decree against another defendant upon such facts: but you cannot have a decree against the party examined upon the facts which he has disclosed as a witness, although you may upon facts to which he is not examined.

It appears, in this case, that a second and third answer have been required—the last of which was decided to be sufficient; and yet, for all this, the complainant wants disclosures from this sole defendant through the examiner's office.

The way to test an interested party-defendant is through his answer: and not upon interrogatories in the office of an examiner.

The case of *Nightingale v. Dodd*, Amb. 583. has been referred to in support of the present motion. But that was a case in which there were several defendants; the application was to examine one of them, who, although interested in the case, was not interested in the matter to which he was examined; and the sole point decided there is this, that a defendant who has been examined under the usual order as a witness, may have a decree against him upon other matters to which he was not examined—thus also showing that a decree cannot be had against such defendant in relation to facts to which he is examined as a witness.

I must deny the motion, with costs.(a)

(a) In connection with the principles embraced by this decision, see the cases referred to in notes to Blunt's edit. of *Ambler*, V. 2. p. 583. In Carey, p. 63, we have the following: "Forasmuch as it is informed, the trial of the truth of the matter resteth altogether in the declaration of the defendant; it is therefore ordered, that the defendant shall be examined upon interrogatories to be administered by the plaintiff, upon whose examination, if the matter fall not out for the plaintiff, then the plaintiff to pay the defendant costs, and the cause to be dismissed. *John Tyfield* plaintiff, *John Vimore* and *Alice* defendants, anno. 2. Eliz. fol. 122."

1834.

TRADES-
MENS'
BANK.
v.
HYATT.

The President, Directors and Company of the TRADESMENS'
BANK v. HYATT.

A defendant must answer to knowledge and information: knowledge alone will not be sufficient.

This case came before the court on exceptions to a master's report allowing exceptions to an answer for insufficiency.

There was only one point of moment, namely, whether a defendant answering as to knowledge, without adding his information, was sufficient.

April 14.
1834.

Pleading.
Answer.
Exceptions.

Mr. Peter A. Cowdry for the complainants.

Mr. Isaac O. Barker for the defendant.

THE VICE-CHANCELLOR:—The defendant is called upon to answer according to the best of his knowledge, remembrance, information and belief. The rules of equity pleading admit of this; and the defendant is bound thus to answer. He undertakes to excuse himself by saying, he has no knowledge whatever, except what is derived from the allegations in the bill. This is not enough. He may still have information, aside from personal knowledge or knowledge derived merely from the bill; and if he has got information from other sources, he may have formed a belief one way or the other concerning its truth. If a defendant says he has "no knowledge or information whatever, except what is derived from the bill"—or if he should say, which would be tantamount to it, "that he is utterly and entirely ignorant, except from the information of the bill," he may then be excused from expressing any opinion or belief about the fact; and the answer, in such form, would be considered

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 RAYMOND
 v.
 REDFIELD.

sufficient. These are clearly established principles of pleading; and they ought to be familiar to every chancery pleader: *Morris v. Parker*, 3. J. C. R. 297.; *Smith v. Lasher*, 5. Ib. 247.; *Utica Insurance Co. v. Lynch*, 3. Paige's C. R. 210. When we apply these rules to the answer of the defendant in the present case, together with the principles embraced in *Sloan v. Little*, 3. Paige's C. R. 103. (and which bear more directly upon the matters contained in the fifth exception to the master's report) I am perfectly satisfied the master has decided correctly in allowing all these exceptions to the answer.

Order accordingly, overruling the exceptions to the master's report, with costs.

RAYMOND and another v. REDFIELD.

A complainant filing a judgment-creditor's bill and failing to discover property, must pay costs on its dismissal.

April 14.
 1834.

 Practice.
 Costs.

The complainant had filed a bill to discover property after the return of *nulla bona* to a writ of *fiery facias* issued upon a judgment at law; and the defendant had answered denying property. There was also no proof; and the matter was reduced to a question of costs. THE VICE-CHANCELLOR decided, that as the object of the bill had entirely failed, it must be dismissed with costs.

Mr. O. Gridley for the complainants. Mr. A. Williams for the defendant.

1834.

LAWTON

v.

LEVY.

LAWTON v. LEVY and others.

A simple contract creditor may file a bill to have the trusts of a deed of assignment for the benefit of creditors carried into effect. But a creditor who wishes to impeach such a deed, must first obtain a judgment and proceed to the extent of an execution at law. A voluntary settlement upon a wife by a husband can only be impeached by a judgment creditor.

If partners dissolve and fraudulently turn the co-partnership property to the payment of private debts, it seems that a simple contract creditor of the partnership may file a bill to restrain them.

The bill was filed by Charles Lawton and by Thomas C. Williams and William H. Mann, partners under the style of Thomas C. Williams and Co., on behalf of themselves and all other creditors of the defendants Hyman Levy and Henry Levy, partners under the firm of H. & H. Levy, in order to set aside one of the trusts of a deed of assignment as fraudulent. The complainants were simple contract creditors upon dishonored promissory notes given by H. & H. Levy for coal sold and delivered. The deed of assignment recited a settlement upon Zipporah, the wife of the said Henry Levy, of the sum of six thousand six hundred and forty six dollars and of which the other defendant Hyman Levy was a trustee, and stated that the amount had been embarked in the co-partnership business of H. & H. Levy. The trusts in the assignment were as follows: (after reimbursing costs, &c.) "And do and shall pay thereout, unto the said Hyman Levy, as trustee of Zipporah Levy as aforesaid, the said sum of six thousand six hundred and forty six dollars, mentioned and set forth in the said deed or declaration of trust above mentioned, together with the interest due thereon, as is also set out in the said deed, it being understood that, for the purpose of perfecting the intention of the said deed or instrument of declaration that the same may not interfere with the operation of these presents, that from the first sales and collections, as soon as the said sum of six thousand

April 28.

1834.

Debtor and
Creditor.

1834.

 LAWTON
 v.
 LEVY.

six hundred and forty six dollars, with the interest thereon over the expences of realizing that amount only, is received and collected in money that the S. B. H. Judah" (the trustee) "or his executor or administrator is to pay over the same to the said Hyman Levy, as trustee as aforesaid, without waiting for the further fulfilment or closing of the trust herein reposed in him; and deducting and retaining the balance of the costs, charges and expences provided for and directed to be retained by the said S. B. Helbert Judah, as is above mentioned. And after full payment of the said monies and all the aforesaid costs, charges, commissions and expences, then *in trust* that the said S.B. Helbert Judah his executor or administrator shall pay to Mrs. Sarah Levy, widow of Solomon Levy deceased, lately of the Island of Jamaica in the British West Indies, but now a resident of the city of New York, the sum of three hundred dollars, with the interest due thereon from the first day of January one thousand eight hundred and thirty two. And also *in trust* that the said S. B. Helbert Judah shall pay to Miss Henrietta Levy, also a resident of the city of New York, the sum of six hundred and forty dollars, with the interest due thereon from the first day of January one thousand eight hundred and thirty two, both of which sums of money are money borrowed from the said Sarah Levy and Henrietta Levy by the said Hyman Levy and Henry Levy and by them placed in their said co-partnership and business. And after the full payment and satisfaction of the same, then *in trust* that he the said S. B. Helbert Judah his executor or administrator do and shall apply the residue of the trust monies in and towards payment and satisfaction of the claims and demands of all the rest of the creditors of them the said Hyman Levy and Henry Levy *pari passu* and without any preference and priority of payment. And after payment and satisfaction of the claims of the said creditors and their debts, claims and demands as aforesaid, then, *in trust* that he the said S. B. Helbert Judah or the executor or administrator of the said S. B. Helbert Judah, do and shall pay the surplus of the said trust monies (if any) unto the said Hyman Levy and Henry Levy their executors, administrators and assigns, &c."

The complainants charged the settlement made upon the

wife of the defendant Henry Levy to be fraudulent as against creditors ; also, that inasmuch as the money was not invested pursuant to the settlement, but was kept in the joint trade of the said H. & H. Levy, therefore the intended *cestui que trust* took no interest thereby and the fund ought to be devoted to the payment of their debts ; and that the fund was and continued to be co-partnership property. These complainants also insisted upon the deed of assignment being made to delay, hinder and defraud creditors, and set forth circumstances in aid of their charges ; alleged the irresponsibility of the trustee (who was made a defendant) ; and prayed for a receiver, injunction and *ne exeat* ; and that the assignment might be decreed to be fraudulent and void and the defendants should account, &c. ; and, for further relief.

An injunction had been granted ; and, upon the coming in of the answers, a motion was now made to dissolve it.

Mr. John Anthon and Mr. S. B. H. Judah in support of the motion.

Mr. S. Sherwood and Mr. O. Bushnell for the complainants.

THE VICE-CHANCELLOR:—Upon the argument of this motion, the question occurred to me : whether a bill like this, by simple contract creditors, could be sustained, even though fraud might appear from the pleadings. I am inclined to think I must test this motion by the bill itself : for, if the complainants have no right to file the bill, then the injunction ought not to be retained until the hearing. It is true, the parties have answered ; yet, although defendants do this in cases where a demurrer will hold, they may raise the objection at the hearing.

The great difficulty is, in the bill being filed by creditors at large, before judgment. No doubt a bill may be filed by such creditors either by simple contract or specialty against the trustees in a deed of assignment for the benefit of creditors, in order to compel a performance of the trust : but, the present is a proceeding to set aside such a deed to a certain extent. The court has been referred to the cases of *Russell v. Hammond*, 1. Atk. 13. and *Taylor v. Jones*, 2. Ib. 600. in sup-

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 LAWTON
 v.
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port of such a bill by simple contract creditors. In *Russell v. Hammond*, the bill was filed by the general creditors of a deceased debtor against his representatives for discovery and payment and to set aside a settlement made on the widow after marriage. Now, this I take to be not a case in point: for, there is no doubt of the right of general creditors to file a bill against personal representatives for payment out of the estate of their deceased debtor. With regard to *Taylor v. Jones*: it would appear from the report of the case that the bill was filed by simple contract creditors; and the question in the cause was, whether a settlement made for the benefit of the defendant, his wife and children, was fraudulent? But the note to the case, by Mr. Saunders, shows that the defendants had given warrants of attorney to the creditors to confess judgments against him and they had given him a letter of license, but it was agreed that the letter of license was not to prevent them from proceeding against his effects, although it was to protect his person. The fact that the creditors had authority to enter up a judgment may have been deemed sufficient to obviate any objection to the filing of the bill, as simple contract creditors, and hence the objection may not have been taken. The Master of the Rolls observes in giving judgment, that "the great question is if the deed be fraudulent? for, if it is, whether the creditors have any specific lien is not material; for as soon as the judgment was entered it would have been a specific lien"—plainly shewing that it was treated as a judgment creditor's bill. It is a principle of the courts that a creditor must first get judgment and exhaust his legal remedy. In *Colman v. Croker*, 1. Ves. Jr. 160; Lord Thurlow said, "as to the fraud" (in making a voluntary settlement) "there must be some creditor to complain of that; and he must put himself into a situation to complain, by getting judgment for his debt, and stating that by the settlement he is defrauded." This rule has been repeatedly recognized in our own court as well as in the English chancery and is too well established to allow of my breaking in upon it: *Wiggins v. Armstrong*, 2. John. Ch. R. 144.; *Brinckerhoff v. Brown*, 4. John. Ch. R. 671; *Williams v. Brown*, lb. 682.; *McDermott v. Strong*, lb. 687.

We have cases in our own books where voluntary settle-

ments have been impeached by creditors. Thus, in *Reade v. Livingston*, 3. J. C. R. 491. a creditor, but still a judgment creditor, filed a bill for such a purpose. The circumstances in *Bayard v. Hoffman*, 4. Ib. 450. were somewhat peculiar. The bill was filed by general assignees of the husband and his partner for themselves and other creditors against the defendants who were assignees for the benefit of the wife and children. The case of *Hendricks v. Robinson*, although not a case of settlement, shows that a creditor desirous of setting aside a trust deed must first have obtained a judgment and proceeded to the extent of an execution.

Nevertheless, there may be cases in which a bill can be sustained by simple contract creditors at large against their debtors. Thus, I am inclined to say, if parties concerned in a partnership have dissolved and made a disposition of the property which was illegal and fraudulent as to creditors of the partnership, the court would sustain a bill filed by the latter, even though they might be only simple contract creditors, and cause the partnership property to be applied to partnership purposes according to law and equity. The present bill alleges a partnership and an assignment made of partnership effects: also, that the money, said to be embraced by the settlement, was invested in the partnership business; and it goes on to insist upon the propriety of applying it to partnership uses. But, there is no distinct allegation of a dissolution of partnership nor of a direct misapplication or diversion of partnership property. When I take the charges in the bill, in connection with its prayer, I do not think I should be justified in a decree on the ground of any apparent danger of misapplication of personal property. The scope of the prayer is, that the assignment may be declared void and the complainants be paid out of the assigned property and for further relief. The prayer for further relief is here in the conjunctive; and it has been decided that, in such a case, no relief inconsistent with the specific relief prayed for, can be had: in order to have the benefit of it, this general prayer must be in the disjunctive.

It appears to me impossible that the complainants can have the relief they want under the present pleading. It only goes upon the ground of fraud in the assignment; and

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HOYT

v.

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doing so, these parties ought to come as judgment creditors who have exhausted their legal remedies. There are suspicions of fraud ; but I must, according to the present character of the bill, dissolve the injunction. I shall do it, however, without costs.

The complainants may find it necessary to dismiss their present bill and file another.

HOYT and others v. HILTON and others, Executors of
Hilton, deceased.

*Infants must file their bills by proctors and not by guardian.
A bill ought not to be filed for a legacy. An application should be made to the Surrogate.
A father only can appoint a testamentary guardian of his children.*

April 28.
1834.

*Legacy.
Guardian.*

Bill of infants under fourteen years of age by their father and "guardian of their persons and estates," against the executors named in their grandfather's will, for the payment of legacies to them "or their said guardian."

By the will of Benjamin Hilton (the grandfather) the children of his daughter Susan, and who were the complainants, had the sum of six hundred dollars bequeathed to each of them and to be paid when they should each attain the age of twenty-one years or day of marriage, with survivorship in case of death. But, by a codicil, the testator revoked these legacies and bequeathed a different sum in the following words: "I hereby revoke the legacies of six hundred dollars bequeathed by me in said will to each of the children of my daughter Susan; and in lieu thereof, I give and bequeath to the children of my said daughter Susan, the sum of one thousand dollars to be equally divided between them." The testator also gave the fifth part of the sum of thirty-nine hundred dollars to the same children, thus: "and to the children of my daughter Susan the remaining fifth part thereof." And he

nominated and appointed his executors and executrix testamentary guardians of the children.

The executors, against whom the bill was filed, had answered it; and the point, as to whether the children were entitled immediately to the legacy, was submitted to the Court.

Mr. *David Graham*, for the complainants.

Mr. *Smith Barker*, for the defendants.

THE VICE-CHANCELLOR:—The codicil in this case is clear and explicit; and there can be no doubt of the right of the children of Susan to an immediate payment of their legacies. But, I consider there are objections to a suit of this nature. The bill is filed by the father of the legatees as their general guardian, appointed by the Surrogate. This gives him no authority to come into this court. A suit for the benefit of infants should be filed by a *prochein amy*; and, since the Revised Statutes, no one else can do it. I hold the statutes to be imperative on this head.

Again: there was no occasion to bring such a bill in this court. The Surrogate has power, under the Revised Statutes, to compel the payment of legacies. The course is expressly laid down in the Statutes. There is, consequently, no necessity for such a bill. I do not mean to say this court has no jurisdiction. But the father ought to go into the Surrogate's Office, where legacies can be ordered to be paid to a general guardian; whereas, here, they cannot: unless security be given and the general guardian be thereby turned into a special one. This has been decided by Chancellor Kent: *Genet v. Tallmadge*, 1 J. C. R. 561.

There is one circumstance, however, which might possibly have led the party to the course here pursued. I refer to the testator's appointment of the executors and executrix as testamentary guardians of the infants who are legatees. It has been decided, and the principle is no doubt so, that a testamentary guardian can only be appointed by a father. The grand-father, in the present case, had no such power: *Fulleton v. Jackson*, 5. J. C. R. 278.

1834.

HOYT
v.
HILTON.

1834. I do not feel disposed to turn this bill out of court. The party may, if he likes, take an order for the legacies to be paid into court for the benefit of the children: but not for the father to receive the money. The costs of the bill ought not to be paid out of the fund.

VAN SCHAICK
v.
STUYVESANT

Mr. *Graham*. There was no idea of requiring costs on either side. Will the court allow the father to give security at this time, as special guardian?

THE VICE-CHANCELLOR. Such a question must come before me through a regular petition. I cannot pass upon it at this time and in this way.

VAN SCHAICK and others v. STUYVESANT and others.

Where a deed of property which ought to have been made by the ancestor and in which infant heirs have an interest, is directed to be executed, their guardian *ad litem* signs for them. And adult parties must execute in their own proper persons.

May 12.
1834.

Practice.
Deed.
Infants.

Nicholas W. Stuyvesant had entered into an agreement for the sale and conveyance of real estate in the city of New York; and the purchasers were to give mortgages for parts of the consideration money. One of the deeds was made out in favor of Peter Stuyvesant only, whereas the name of Francis Salmon ought also to have been inserted; and Nicholas died before he could execute a proper deed to the said Peter and Francis. He left a will and codicil. A bill was now filed to obtain a decree for the heirs of Nicholas W. Stuyvesant to convey to Peter Stuyvesant and Francis Salmon the land which was to have been transferred by the testator. Some of these heirs were infants. A decree, pursuant to the prayer of the bill, was obtained. The draft of it required a master to execute the necessary conveyance "for and in behalf of the infant defendants in this cause and in their names and also for and in behalf of and in the name of any

or either of the adult defendants, in case any or either of them declined or neglected to execute the same." THE VICE CHANCELLOR said, there must be an alteration in this part. The general practice of the court required the guardian *ad litem* to execute, acknowledge and deliver the deed for and on behalf of the infant defendants, (2 John. Ch. R. 537. ; 5. ib. 261) while the adult defendants must execute for themselves—they could be compelled to do so and the master ought not to sign or acknowledge for them.

1834.

SUMMERS
v.
MURRAY.

Mr. H. Fish, for the complainants.

SUMMERS v. MURRAY, *et al.*

To a bill to set aside an award for corruption, the defendants joined in answering and in pleading the award. The answer preceded the plea and commenced as a general answer, and had no saving as to the plea; nor did the latter appear to be otherwise than a pleading to the whole of the bill: Held, that the plea was bad.
It is very doubtful how far arbitrators charged with corruption can join with parties in pleading the award.


Where an answer accompanied a plea and the latter was overruled, the complainant was allowed twenty days to except to the answer.

Bill to set aside an award, on the ground of corrupt conduct by the arbitrators. The latter were made parties.

July 8.
1834.

All the defendants joined in an answer and plea. The answer preceded the plea; and it commenced as "The joint and several answer of Janet Murray, James D. Stout, Edward G. Cooke and Hugh Murray to the bill of complaint of John S. Summers, complainant," and went on with the usual "saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer, &c." It answered the whole of the bill; ended with the usual denial of combination and the general traverse; and was sworn to. Then came the plea, which commenced as "The joint and several plea of Janet Murray,

Pleadings.
Answer.
Overruling
plea.
Arbitrators.
Award.
Practice.
Time to except to answer upon overruling plea.

1834.  SUMMERS
v.
MURRAY. Hugh Murray, Edward G. Cooke and James D. Stout, defendants to the bill of complaint of John S. Summers, complainant;" and a jurat was attached. It was a plea of the award.

The plea now came up for argument.

The counsel for the complainant objected to the form of the pleadings ; insisting that the answer overruled the plea , and relied upon the case of *Leaycraft v. Dempsey*, 4. Paige's C. R. 124.

Mr. J. B. Scoles, for the defendants.

July 14. THE VICE-CHANCELLOR :—Even if this should be found a proper case for a plea of the award by all the defendants (thereby including the arbitrators)—which I very much doubt—yet the plea and answer are so informally put together as to leave no question of the answer overruling the plea : *Leaycraft v. Dempsey*, 4. Paige's C. R. 124.

Nor do I see any necessity for permitting the plea to stand for an answer or allowing it to be amended. The answer, which is entirely distinct from the plea and which purports to be an answer to the whole bill—as if no plea had been interposed—covers the whole ground upon which the award is sought to be impeached ; and if supported by proof, even standing without the matters of the plea, it will be sufficient to put an end to the cause in this court. And in case the answer should be disproved, I apprehend the only relief which this court will give upon the present bill must be, to set aside the award, leaving the parties, in relation to the matters submitted to arbitration, to their legal rights and remedies. I am strongly inclined to doubt how far arbitrators can, in a case charging corruption, plead their award. But, at present, all I can do is to overrule the plea, with costs.

The counsel for the complainant asked that the order overruling the plea, might also give his client twenty days, from its date, to except to the answer.

THE COURT allowed it.

1834.

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HART

v.

HART.

HART v. HART.

Where a reference is had to a master to report upon the allegations in a bill filed for a divorce on the ground of adultery, the facts of the adultery must be distinctly proved. The mere living together in the same house as man and wife, unaccompanied by proof of cohabitation, is insufficient. A decree for divorce *a vinculo matrimonii* is not to be founded upon conjectures.

Bill by wife against husband for divorce *a vinculo matrimonii*. A reference had been had to a master to take proof of the facts charged in the bill and to report his opinion. The master reported that from the facts sworn to by the only witness produced before him (whose affidavit was annexed to the report) there was sufficient to entitle the complainant to a divorce. July 14.  
1834.

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Practice.
Divorce.
Proof of a-
dultery.

The witness swore that he had been to the defendant's house and was there introduced to a lady as Mrs. Hart, whose real name was Mary Braddock; that she had the charge of the defendant's house and acted as the mistress of it; and the defendant had admitted to the witness his having had cohabitation with Mary Braddock. Also, that the latter is reputed to be the wife of the defendant among his acquaintances. The report had been left with the court to be passed upon.

THE VICE-CHANCELLOR :—I have looked into the report and the affidavit annexed to it; but cannot think enough is shown to prove any act of adultery. The latter merely sets forth that the defendant is living separate from his wife and has a woman residing with him. No other cohabitation is proved. The court will not grant a decree in such a case upon conjectures. I must have stronger testimony before I make a decree. This report may go back to the master, for the purpose of giving the complainant an opportunity to strengthen the testimony.

Mr. E. Morrill, for the complainant.

1834.

FAIRBANKS

v.

FAIRBANKS.

BRIDGES and another v. CANFIELD and others.

SAME v. CANFIELD and others.

Where non resident complainants give security for costs and one of the sureties becomes insolvent, a new one must be added and proceedings stayed until it is done.

July 14.
1834.

Practice.
Security for
costs.

Complainants were non residents. They had been required to give the usual security for costs. This had been done: but one of the sureties in both suits had become insolvent. An application was now made, through an affidavit, "that the complainants file new or further security for costs in each suit in such sum as the court may be pleased to direct and that until such security be filed and the surety, if excepted to, shall have justified, all proceedings on the part of the complainants be stayed or for such further order," &c.

THE VICE-CHANCELLOR granted the application.

Mr. O. Bushnell moved.

Mr. W. S. Sears opposed.

FAIRBANKS v. FAIRBANKS.

In divorce cases, the original testimony taken before a master is to be filed with his report and the court will not be satisfied with a copy.

August 11.
1834.

Practice.
Divorce.
Testimony
taken before
master.

This was a case of divorce; where there had been a reference to a master and he had returned a copy of the testimony with his report. THE VICE-CHANCELLOR wished it to be understood that in future, he should require the original depositions, taken before masters, in divorce cases, to be annexed to the report and filed in the clerk's office: for, although they were, no doubt, always preserved by the masters, yet they would be safer upon the files of the court and be then readily got at in case of any false swearing.

1834.

JOLLY
v.
CARTER.

JOLLY v. CARTER, Executor, &c.

If a defendant does not state facts in matter of avoidance or by way of defence with sufficient particularity to lay the foundation for proofs, the testimony he offers in support of such statement will be rejected and the complainant cannot be prejudiced by the insufficient matter.

Where a complainant avers the alienism of parties as a ground for their not being entitled under a will, it is not impertinent in a defendant, executor, to allege in his answer that the complainant (who also claims rights under the same will) is an alien.

An executor, in setting forth in his answer the account or inventory of the estate which came to his hands, should not add copies of the appraisers and executor's oaths and of the surrogate's certificate. These may serve as evidences of the correctness of the inventory, but in pleading in general, it is not necessary or proper to set forth the evidence on which the defendant means to rely. Such matter will be impertinent in pleading.

An executor who is called to account, is not subject to an exception for scandal and impertinence, for saying in his answer that some of the property is withheld from him by a forged deed possessed by the complainant: for his silence might prejudice him hereafter.

Fraud upon the provisions of a law or corrupt swearing, in order to come within the benefit of a statute, is matter which may be enquired of in equity; and, therefore, it is not impertinent and scandalous in an answer to say that fraudulent and corrupt means were pursued by the complainant to procure his naturalization and that, although he had gone through the form of becoming a citizen, yet he was still an alien.

Complainant succeeds upon only one of eleven exceptions. He is entitled to costs of drawing this one exception, but neither he nor the defendant has costs of the reference; but the latter has costs upon the exceptions to the master's report and of the hearing, subject to the complainant's costs on the hearing.

Exceptions to an answer. Eleven exceptions were referred to a master; and five were allowed, namely, the fourth, fifth, eighth, ninth and eleventh. The defendant now excepted to the report.

October 6.
1834.

Pleading.
Exceptions.
Insufficiency.
Impertinence
and scandal.
Costs.

Mr. D. E. Wheeler in support of exceptions to the master's report.

Mr. H. S. Mackay, contra.

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THE VICE-CHANCELLOR:—The fourth exception is not well taken. The clause in the answer, out of which it arises, is responsive, so far as it admits that he, the defendant, did advertise the real estate for sale under the power in the will; and the concluding sentence—"that he had made arrangement to sell the same to great advantage and for its full value, but was prevented by the conduct and interference of the complainant"—is new matter, offered by way of excuse or defence, and not called for by the bill. If there be any insufficiency about it or objection on the ground of its not being full and explicit enough to put the matters in issue, it will not do for the complainant to except. Where a defendant answers all that the bill requires of him and then goes on to state matter in avoidance or by way of defence, and the latter does not give facts with sufficient particularity to lay the foundation for proofs, the testimony, when offered in support of such a statement, will be rejected; and the complainant is not then, of course, prejudiced by the insufficient matter. On the other hand, if the complainant, for his own purposes, is desirous of having a further discovery of the facts to which such general averment in the answer refers, he should move to amend his bill in order to obtain it and not take exception to the answer as being insufficient.

I likewise differ with the master as to the eighth exception. The bill alleges that certain of the devisees named in the will are aliens and cannot take the property; and the complainant, for this reason, claims to be entitled to what would otherwise go to them; and if he also be an alien, he is in a like predicament; and I do not see the propriety of rejecting, as wholly irrelevant and impertinent, an averment of the complainant's alienism.

The eleventh exception appears to have been properly allowed. In setting forth the account or inventory of the estate which came to the defendant's hands, it was unnecessary to set out copies of the appraisers and executors' oaths and of the surrogate's certificate subjoined. These may serve as evidences of the correctness of the inventory: but, in pleading, it is not necessary or proper to set forth the evidence upon which the defendant means to rely. Copies of these documents were unnecessary in this respect; and they

might, not only be objected to upon taxation as prolix, but also be excepted to as impertinent in pleading: *The Union Insurance Co. v. Van Rensselaer*, 4. Paige's C. R. 85.

With respect to the fifth and ninth exceptions taken for scandal as well as impertinence: it appears to me the master has erred in allowing them. The defendant, in the matter of the fifth exception, is called upon to give an account of the estate which belonged to his testator; and when answering, in addition to what had come to his hands, he mentions certain leasehold property of which the testator died seized but which, as he says, the complainant now holds under a forged assignment. If the question of forgery is to be tried in this court, a cross-bill must be filed to set aside the assignment and a feigned issue can then be directed; and to lay the foundation for such a bill, it is proper for the defendant to make this allegation in his answer. So, likewise, if the defendant should resort to an action of ejectment for the purpose of trying the question of validity of the assignment; it is not improper in him to state, at once, when called upon to give the particulars of the estate of which he has possessed himself or ought to have done so as executor, that a portion of it is withheld from him or is in the possession of the complainant by means of a forged instrument: for his silence at this time might prejudice his assertions hereafter, if not preclude him from his rights. Although the allegation of forgery reflects upon the character of the complainant to an amount of gross criminality, yet it is not impertinent matter, for the reasons I have given, and must not be expunged as scandalous.

The ninth exception relates to the complainant's alleged alienism and the suggested fraudulent and corrupt means pursued by him of procuring his naturalization papers. The answer says that although he, the complainant, has gone through the form of becoming a citizen, yet he is still an alien. Fraud upon the law or corrupt swearing in this particular appears to me to be matter which may be enquired into here, in opposition to claims which this party asserts as a citizen; and to which he can have no right if he be an alien, provided the position taken in his bill, with regard to alien devisees, be correct. I am not prepared to say that

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the question of his alienism and the obtaining a false certificate of citizenship by means of subornation and perjury, are matters unimportant and irrelevant in this case ; and, therefore, think the ninth exception should not have been allowed by the master.

The master's report must be overruled, except as to the matter of the eleventh exception.

As the complainant succeeds in sustaining only one of his eleven exceptions, he is entitled to the costs of drawing this one exception ; but not to any costs of the reference : 63. Rule. Nor is the defendant entitled to costs on the reference against the complainant : because he should have submitted to the one exception finally allowed. But the defendant is entitled to his costs upon the exceptions to the master's report and of the hearing : subject, however, to an offset of the complainant's costs on the hearing, he having been obliged to come here for the purpose of sustaining the report in one particular and in which he has been successful.

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THOMPSON and others v. MATTHEWS and others.

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This court will not interfere to stay vehicles with heavy loads from passing over a public wooden bridge : but must leave the parties to law.

Although the court interferes to prevent irreparable injury, still it does not do so where damages can be ascertained at law, and compensation can be made in money.

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October 13. The defendants, Charles S. Matthews, Charles Woods and  
 1834. James Hall, were ordered to show cause on this day why  
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Jurisdiction. an injunction should not issue, restraining them "from transporting or causing to be transported across the bridge from
Bridge. Harlæm across the Harlæm river any marble or stone in
Injunction. quantities exceeding at one time or in any one load the weight of two tons, until the further order of the court."

The bill in the cause was filed by Samuel M. Thompson, Samuel Flewelling, William F. Coles and Isaac U. Coles, for


and in behalf of themselves and the other owners and proprietors of the bridge.

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The act for building the bridge, entitled "An act for building a bridge across Harlæm river," passed 31st March, 1790, empowered Lewis Morris his heirs or assigns, at his and their expense, to build a bridge from Harlæm across Harlæm river to Morrisania, agreeable to the dimensions and directions in the act set forth; and that it should and might be lawful for the said Lewis Morris his heirs or assigns, for and during the term of sixty years, to ask, demand and take, for the use of the said bridge, a toll not exceeding the rates limited in and by the said act. In another act of the legislature, passed 24 March, 1795, entitled "An act to enable John B. Coles to raise a dam across Harlæm river and to amend an act entitled an act for building 'a bridge across Harlæm river,'" after reciting the act above mentioned and that the said Lewis Morris had assigned his right to build the said bridge and proposals had been made by John B. Coles to the assignees of the said Lewis Morris to raise a dam of stone for the purpose of erecting mills thereon and to be the foundation of the bridge aforesaid, it was, amongst other things, provided that the said John B. Coles his heirs and assigns should be &c. and they were thereby authorized to build a dam across Harlæm river, at such place as was or should be determined on by the assignees of the said Lewis Morris in pursuance of the act therein recited and that such dam should be made of stone and so constructed as to be the foundation of the bridge and for collecting the water of the river for the use of grist and other mills.

The bill, after setting forth the above acts, stated that the bridge was afterwards and within the time limited erected and completed by the said John B. Coles in the manner and of the dimensions directed in and by the aforesaid acts; and that the same had ever since been maintained and preserved in good and sufficient repair by the said John B. Coles or his assigns and who had ever since the erection thereof claimed and received the tolls authorized by the aforesaid acts and another act amendatory thereof. That the complainants were respectively and regularly the assigns of the

1834.  said Lewis Morris and John B. Coles of certain shares or interests in the said bridge and, as such, respectively the absolute proprietors of the said shares in the said bridge and liable to their proportions of the expenses of the said bridge and of maintaining and preserving the same in good and sufficient repair and entitled to their shares of the tolls thereof in proportion to the amounts of their respective interests therein; and they were now, by the lawful appointment of the other proprietors of the said bridge, the directors thereof and, as such, had the undisputed control and management and were in receipt of the tolls for and on their own behalf and that of the said other proprietors. And they further showed, that the said bridge was originally built in a strong and substantial manner and had ever since been so maintained and preserved and had always afforded and still did afford a safe, commodious and suitable passage across the said river for all descriptions of vehicles containing loads of an ordinary or in any wise a reasonable weight. That, within a short time last past, the defendants, Charles S. Matthews, Charles Woods and James Hall, had engaged and were then engaged in business of quarrying marble at a quarry in the county of West Chester, distant about five miles from the said bridge, and of transporting the same by land across the said bridge to the city of New York and the said marble, when quarried, was transported across the said bridge in waggons of an extraordinary size and weight, drawn by five or six horses; that the marble transported in one of the said waggons at each time usually consisted of several pieces which were ordinarily of the aggregate weight of about four tons, independently of the weight of the waggon and horses, and that loads of marble of the weight above stated had, for some time past and then were, daily and sometimes several times a day transported across the said bridge by the said Charles S. Matthews, Charles Woods and Samuel Hall or by their orders or directions and the said loads sometimes exceeded the weight above stated, amounting, in one instance, independently of the waggon, to the weight of seven tons or thereabouts; that the said bridge, although built in a solid and substantial manner and calculated to afford an entirely safe means of transportation to

carts, waggons or other vehicles with loads of an ordinary or reasonable weight, was not built or intended for and was not a safe means of transportation for masses of the extraordinary weight above stated; that a load weighing two tons was far beyond the weight which was usually or often carried in a single vehicle and was the greatest weight which could be habitually transported across the said bridge with safety to it and to the load itself; that some of the timbers had already been broken or damaged by the aforesaid immense weights transported across it: and the complainants had every reason to believe and did believe that if the transportation of the aforesaid heavy loads across the said bridge was permitted and continued, the said bridge was daily in imminent danger of being broken down and thereby the property of the complainants and the other proprietors was not only in imminent danger of being destroyed or materially damaged, but the lives and property of other persons who were in the habit of crossing said bridge were constantly in danger. The bill further stated, that the toll receivable under the aforesaid acts on each of the said loads was nine pence. Also, that they, the complainants, had forbidden the defendants to transport such loads of immense weight across the bridge, but the latter had disregarded it and avowed their intentions of continuing such transportation, although the complainants charged and averred that the quarry of the defendants was distant but about a mile and a half from the Bronx-river-landing at West-farms, to which the marble might be carried and there transported without any difficulty by water to the city of New York. And also, that the said loads, as they consisted of several distinct pieces, might, with but slight trouble and inconvenience to the carriers thereof, be separated and carried across the said bridge at different times and in quantities which would not endanger its safety.

The defendants put in an affidavit, made by one of them (Charles S. Matthews) shewing, that he and the other defendants had contracted, under a penalty, to furnish and deliver marble for the basement of the new custom house in the city of New York from the quarry at Morrisania and had expended a large sum in purchasing teams, constructing

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1834. roads and in other preparations; that the only direct route from the said quarry to the custom-house was across the bridge; that the navigation by the Bronx-river and through Hurl gate was unsafe; that the marble, if brought by water, would have to be loaded and unloaded six times, whereas, in bringing it by land, it was only necessary to have two removals; that the contractors would not be enabled to perfect their contract in time, if prevented from transporting the marble by land; that about five years back, the deponent was engaged in constructing the Baltimore and Ohio rail road near Elicott's mills, Maryland, and was then accustomed to see five and six horse teams haul daily, for the purpose of building bridges on the said rail road, heavier loads of stone across a wooden bridge over the Patapsco river at Elicott's mills than the defendants were accustomed to carry across the said bridge at Harlæm; that the marble procured for building purposes in Philadelphia, from the quarries in its vicinity, is carried across the bridges over the Schuylkill, which are constructed of wood, and the loads so carried are frequently from eight to ten tons each; and that any bridge of ordinary strength or ordinarily well constructed ought to be sufficient to sustain any load which had been brought across the said bridge by the defendants and much more.

THOMPSON
v.
MATTHEWS.

Mr. G. Griffin for the complainants.

Mr. D. Selden for the defendants.

November 3. THE VICE-CHANCELLOR:—The motion for an injunction cannot be granted. The road across the bridge is undoubtedly a highway, though all persons and carriages passing must pay a toll: but, still, it is a public highway. The affidavits in opposition take very much from the force of the allegations in the bill. But this is a case in which the parties have legal rights. The bridge is a public one. If persons take improper loads and the bridge has been properly constructed, then the owners of it have a remedy by a special action on the case or in trespass for damage done; while, on the other hand, if passengers and their property should

sustain an injury by a breaking from ordinary loads, the owners must respond in damages. The law affords a reciprocal remedy in all such cases; and I shall leave the parties to their legal right.

It is true, this court has jurisdiction to prevent irreparable injury; but the injury is not irreparable, where damages, as here can be ascertained without difficulty, and compensation made in money. And I would observe, with respect to the tolls, that no equity arises from the circumstance of the complainants not being enabled to charge more than nine cents for a heavy load. This is a matter for the legislature; and the complainants will have an opportunity of applying for an amendatory act, raising their tolls, before the contract, which the defendants have entered into and which requires this large quantity of marble to be transported, shall have been completed.

Motion denied.

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CANFIELD.

BRIDGES and another v. CANFIELD and others.

Bill to be dismissed, if security for costs by non-resident complainants were not given within 30 days: the parties not having complied with a former order for security.

Complainants were non-residents. They had given security for costs to the amount of five hundred dollars; but, in consequence of a surety becoming insolvent, an order was made on the fourteenth day of July one thousand eight hundred and thirty four requiring the complainants to file fresh security. At the present time, the defendant's solicitor made an affidavit whereby it appeared that no new security had been filed; and a motion was made "that the complainants give security for the said defendants costs, by a bond in the penal sum of five hundred dollars, with two sufficient sure-

October 20.
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Practice.
Costs.

1834. *ties to be approved by the clerk of the court and filed in his office within twenty days or such other time as the court may direct; and in default thereof, that on filing an affidavit of such default, an order be entered of course dismissing the bill, with costs or for such other order as the court may be pleased to grant.*

STEPHENSON
v.
PARKINS.

Mr. O. Bushnell, for the motion.

Mr. W. S. Sears, contra.

November 3. **THE VICE CHANCELLOR** :—Upon the strength of adjudged cases (*Massey v. Gillilan*, 1. Paige's C. R. 644; *Fulton v. Roosevelt* lb. 178.) and what is said by Mr. Hoffman, in his Practice (1. vol. 201) let an order be entered requiring the security referred to in the order of the fourteenth of July last to be perfected within thirty days or that the bill be dismissed.

STEPHENSON v. PARKINS.

Form of order upon a judgment creditor's bill taken pro confesso.

December 1. A judgment-creditor's bill; and which had been taken as confessed. It had been put upon the calendar; and the question was, as to the extent of the decretal order. The counsel for the complainant proposed it should embrace, not only the appointment of a receiver and the examination of the defendant, but also that the receiver should pay the amount to be found by the master due to the complainant and his costs out of the first monies. **THE VICE CHANCELLOR** considered the order should not go so far; and the following form was entered, as settled:

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Order.
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Creditor's
Bill.

"This cause coming on to be heard upon the bill taken as confessed; on reading and filing an affidavit of due service of notice of hearing upon F. D., Esquire, the defendant's solicitor and an affidavit of the regularity of the proceedings to take the said bill as confessed; no counsel appearing on behalf of the defendant; and after hearing Mr. C. E. of counsel for the complainant: it is ordered, adjudged, and decreed, that it be referred to S. C. Esquire, one of the masters of this court, residing in the city of New York, to ascertain whether any receiver of the estate and effects of the defendant J. W. P. in any suit has been appointed; and if so, then to report to this court. And if not, then to appoint a proper person to be receiver of the money, property and things in action of the said J. W. P. with the usual powers and authority and to take from him the requisite security. And that the said defendant do assign, transfer and deliver over unto the receiver appointed or to be appointed as aforesaid under the direction of the said master all his property, equitable interests, things in action and effects; and that he appear before the said master from time to time and submit to such examination as the said master shall direct in relation to any matter which he was legally required to disclose if he had answered the bill of complaint in this cause; and that the complainant be at liberty to examine witnesses before the said master as to the property of the said defendant or as to any other matter charged in the bill and not admitted by the defendant on such examination. And all further directions are reserved until the coming in of the master's report."

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v.

CITY OF N. Y. VERPLANCK v. THE MAYOR, ALDERMEN and COMMONALTY
of the city of New York.

A person taking out a water-grant from the corporation of the city of New York for a lot of fifty feet in front on the river and binding himself to construct a wharf or bulk head along the entire front of the grant and thereupon being entitled to all the emoluments accruing from it, does not deprive himself of the right to any portion of the wharfage by dedicating a part of the lot to the public for the purposes of a street or passage.

The owner of upland to which wharfage or other incorporeal hereditament attaches is entitled to all such incorporeal right, so long as he retains the ownership of the soil.

A giving to the public of a perpetual right of way over the land, without an actual grant or conveyance of the land, is not a relinquishment of any of his rights incident to the fee.

The owner of a bulkhead or wharf against which a pier is placed, becomes entitled to his proportion of wharfage arising from the pier in common with the owners of the bulkhead who contribute to the building of the pier for the purpose of forming a slip or basin.

Construction of the statute in relation to wharves, piers and slips and of the powers of the corporation thereunder (2 R. L. of 1813. 431, § 224, 225, 228, 230.)

1834.

December 3.

Wharf.

Bill to establish a right to wharfage from a portion of a slip on the westerly side of the pier at the foot of Beekman Street in the city of New York ; and, for an account of the Wharfage received by the defendants.

In the year one thousand seven hundred and fifty, the then Mayor, Aldermen and Commonalty of the city of New York granted to Robert Crommeline for ever, subject to an annual quit rent, a certain water lot, to be made land and gained out of the East River, bounded northerly by Water Street and extending southerly into the East River, containing in breadth on Water Street as well as in the rear on the East River or harbour fifty feet and in length two hundred feet. The grantee was to construct, upon the outward part of the lot, a wharf or street of forty feet in width and which should for ever thereafter continue and be a public street. In consideration whereof, the grantee his heirs and assigns were, at all times, to enjoy, take and hold, to their own use, all wharfage which should arise or accrue from the wharf so to be made. One


Robert Livingston was a grantee, upon like terms, of a similar lot adjoining the westerly side of that granted to Crommeline. These parties filled in their respective lots and constructed a wharf at the extremity of their grants; and, by an indenture under their hands and seals, dated the third day of December one thousand seven hundred and sixty two, they agreed to open a public street over a part of their lots and thereby (and for this purpose) each of them relinquished twelve feet of the width of their ground, "in order to make a commodious public street of twenty four feet wide, leading from Water Street down to the new wharf fronting to the East River. The public street so to be made to be called and known by the name of Crane Street."

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The street of forty feet in width, reserved in the grants from the corporation and being at the extremity of the lots and adjoining the river afterwards formed a part of Front Street.

In the year one thousand seven hundred and ninety one, Robert Crommeline died, seized of the property. He had made a will with several codicils; and appointed Daniel Ludlow, Gulian Verplanck, Francis Lewis and Daniel C. Verplanck, his executors; giving power to them or any two of them to sell and dispose of all his real estate, if they should judge it necessary, for the purpose of facilitating a division of the same amongst the devisees, but without devising the estate or any part of it to the executors in trust or vesting them with a legal title. They all qualified as executors.

While the pre-emption, in respect to the water lot contiguous and extending further into the East River, still belonged to the estate of Robert Crommeline, the corporation of the city of New York, by an indenture bearing date the seventeenth day of January one thousand eight hundred and four, granted to Daniel Ludlow, Francis Lewis and Daniel C. Verplanck, describing them as surviving executors "of the will of Robert Crommeline, deceased, and to their heirs and assigns for ever, the water lot between Front Street and South Street fifty feet in width and extending in length from Front Street to South Street—as by a map of the block of ground, surveyed July 26th 1803. by a city surveyor, to which reference being had would more fully appear." This grant was subject to an an-

1834.  nual quit rent of fifty dollars. The deed contained the usual covenant for payment of the rent; a clause for re-entry in case of default; a covenant that the grantees their heirs or assigns would build a good and firm wharf or street of seventy feet breadth, to be called South Street, in front of and contiguous to the south easterly end of the lot thereby granted, which should remain a public street or highway; and the grantees their heirs or assigns, upon paying the rent and fulfilling the covenants therein contained, were, at all times forever thereafter, to take and hold, to their own use, all manner of wharfage, crannage, &c. to accrue by or from the said wharf or street of seventy feet in breadth fronting on the East River opposite to the premises thereby granted. Under this grant, the lot from Front Street to South Street was filled in, while South Street and the wharf were constructed, and Crane Street was extended to South Street the same width as from Water Street to Front Street. The map to which the grant referred and upon which the lot was delineated, showed that a space of twelve feet was intended, for the purpose of continuing such street and that only thirty eight feet of the fifty, in the width of the lot, were to be occupied.

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Under an act of the legislature, passed March 14. 1817. the corporation of the city of New York had become possessed in fee simple of the site on which Fulton Market is erected, as the same was bounded by Fulton Street on one side and Crane Street or (as sometimes called) Crane-wharf on the other, and also of the wharves and piers in front of the market and contiguous to South Street.

In the year one thousand eight hundred and twenty one, the proprietors of water lots and wharves in front of South Street, between Crane-wharf Street and Peck Slip, petitioned the corporation to have a pier built in the East River in front of Crane-wharf Street. A resolution to the following effect was passed: "that a pier be built in the East River at the foot of Crane-wharf Street of such dimensions and in such manner as should be directed by the committee on wharves, piers and slips and street commissioner: provided the proprietors of water lots between Crane-wharf Street and Peck Slip bear and pay two third parts of the expense thereof."

Under the authority of this resolution, a pier was built.

The testimony showed it to be usual for the corporation to bear one third of the expense of constructing piers where they own or are entitled to the water on one side or when the pier to be built formed one side of a public slip. In this instance, their object was to have a slip on the westerly side of the pier and in front of Fulton Market. Instead, however, of placing the pier, which was thirty feet in width, directly at the foot or in front of Crane-wharf Street, as mentioned in the resolution, the committee who had it in charge, located the same on the easterly side of the foot of the street, so that it occupied thirty feet of the bulk-head or wharf built by the executors of the Crommeline estate in front of their grant, exclusive of the twelve feet thrown into Crane-wharf Street and leaving the bulk-head and the water immediately in front of Crane-wharf Street, including the twelve feet before mentioned, to form a part of Fulton Market Slip on the westerly side of the pier.

In consequence of thus locating the pier and while the same was building, the subject of apportioning the expense was again brought before the common council, upon the petition of a number of the proprietors of property on the eastern side of the pier, suggesting that, as the pier was built upon private property and inasmuch as private property remained on the western side, the petitioners ought not to pay more than one half the expense of building it. The report of a committee of the corporation, founded upon what they understood to be the law and usage in similar cases, stated that, although the pier was erected in front of private property, yet the owners of such property were to be indemnified, by taking wharfage and slippage along the easterly line and along one half of the head of the pier in common with other individuals owning fronts and in proportion to the water-front which they had at the time of locating the pier. And a resolution was accordingly adopted by the common council, declaring the parties liable to pay one third part only of the expense of erecting the pier; and that when it was finished, they would be entitled to all wharfage and slippage on the westerly side of the pier and to one half of the wharfage arising at the head or outer end of the pier. By this act, the corporation assumed to be the proprietors of the whole

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wharfage and slippage on the westerly side of the pier in the same manner as if the pier had been placed directly opposite to the foot of Crane-wharf Street and as if the centre of the street and pier had formed one continuous line. If the pier had been thus placed, Fulton Market Slip would have been narrower by twenty seven feet than it is now ; whereas, by the present location, the corporation have gained so much in the width of their slip, while, on the opposite side, the slip or basin belonging to individual proprietors is, to the same extent, contracted.

In the year one thousand eight hundred and twenty two, the subject again came before the corporation : and the present complainant then presented a memorial respecting the water-rights of the proprietors and requested payment from the corporation for the privilege of wharfage for the bulk-head between the centre of the pier and a point opposite the western boundary of the grant belonging to the Crommeline estate—being the twenty seven feet above mentioned. The common council again resolved that the individual proprietors of the property in front of which the pier was erected, including the land which laid to the westward of the middle of the pier, as far as the westerly line of the water grant made to Crommeline as well as that which was situated on the easterly side of the centre of the pier, were to be indemnified for the loss of bulk-head occasioned by the building of the pier, by taking wharfage and slippage along the whole length of the easterly side of the said pier and on the head or outer end of the same in proportion to the loss of bulk-head which they had sustained and in common with other persons interested therein.

It appeared, from the testimony of the wharfinger, that, in behalf of the individual proprietors interested in the bulk-head and pier, he had collected the wharfage on the easterly side of the pier and at the outer end of the same and which he had divided and paid over to them from time to time in proportion to the extent of their ownership of the bulk-head : except to the complainant, who had only been allowed to receive his proportion, with other proprietors, upon about twenty three feet of the bulk-head excluding him from any participa-

tion as respected the part of it which was to the westward of the centre of the pier.

The street commissioner stated in his testimony, as the reason why one third of the expense was borne by the corporation, that the pier was to be the boundary of a public slip and it could not have been located more advantageously for the individual proprietors, and it would be no advantage to the corporation to have the space between this pier and the next (to the eastward of it) wider than the same is now; that the slip between them was designated for ships of heavy burthen and is of the proper width and is used for that purpose. The witness also proved that the establishment of a public slip in front of private property is considered a full equivalent for the surrender of wharfage by the proprietors on account of the benefit it is to their estate; and there are numerous instances where individual proprietors are at the expense of making and maintaining piers for the advantage of having the corporation slips in front.

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Hence arises the claim now made upon the defendants.

Mr. *W. H. Harison* and Mr. *G. F. Talman* for the complainant.

Mr. *M. Ulshæffer* and Mr. *Robert Emmet* for the defendants.

THE VICE-CHANCELLOR:—It has been made a point in the cause whether the grantees, by accepting the grant upon the understanding of dedicating twelve feet to the public as a street and occupying the residue only for private purposes, could afterwards claim wharfage for any more than thirty eight feet of the front or southerly side of South Street. By the terms of the grant, they were bound to construct the wharf at their own expense and make South Street, along the entire front of fifty feet. This has been done. The deed declares them entitled to all the emoluments accruing from the wharf or street fronting on the river opposite to the premises and every part thereof. This right to wharfage upon the whole extent of fifty feet is thus, in terms, secured, although it was intended, by all parties, that a strip of twelve feet of land should be sacrificed to the public.

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1834. Crane Street extended no further than to the northerly line of South Street and so far the sacrifice was made ; but it did not carry with it a relinquishment of the right to collect wharfage at the bulkhead on the southerly side of South Street and this right remained upon the whole extent of the bulk-head, notwithstanding a part of the lot was given up to public use.

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The owner of upland to which wharfage or other incorporeal hereditament is appendant, may apply it to any use or purpose he thinks proper ; and, so long as he retains the ownership of the soil, he will be entitled to all such incorporeal right. A giving to the public of a perpetual right of way over land, without an actual grant or conveyance of the soil, is not a relinquishment of any rights which the giver might have as incident to the fee. In the present case, there is nothing in the mere dedication of a portion of the lot between Front Street and South Street to the public for a street which can, in my opinion, impair the right of the grantees to the wharfage or other emoluments to be derived from the use of the water and bulk-head in front of the grant.

The right of the estate of Crommeline to wharfage upon the whole extent of his front of fifty feet, seems to have been conceded by the defendants. The principle upon which the reports of their committee and the resolutions of their board proceeded, admit that the owner of a bulk-head or wharf against which a pier is placed, is not, thereby, deprived of wharfage. Instead of wharfage at the bulk-head within the space occupied by the pier, his wharfage accrues from the use of the pier ; and as there are a number of individual proprietors who contribute to the expense of building the pier and who are interested in the slip or basin formed by the bulk-head and piers, they become tenants in common of the revenue arising from the use of it and this revenue or income is apportioned among them according to the extent of each party's ownership in the front or bulk-head. In the present case, if the pier had been placed so as to have left no part of the bulk-head or wharf belonging to the Crommeline estate to the westward of the pier, then there would have been no difficulty. But, in consequence of the manner of locating the pier whereby a part of the bulk-head is comprised

within Fulton Market Slip, the question is : whether the corporation have a right to refer the complainant or the devisees of the Crommeline estate to the outer end of the pier and to the easterly side thereof for all the wharfage which the whole extent of their bulk-head entitles them to receive?

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This point involves an enquiry into the powers of the corporation concerning public docks or slips and the location and construction of piers. Several acts of the legislature have been passed upon the subject ; and they are now consolidated in the general law of 1813. (2. R. Laws, of 1813. p. 431.) The 224. and 225. §. relate to the building of piers as private property ; and the corporation are vested with authority to direct piers to be sunk and completed at such distances and in such manner as they, in their discretion, shall think proper and by such time as they shall appoint, at the expense of the proprietors of the lots lying opposite to the places where the piers shall be directed to be sunk, and then to grant to the owners of lots—meaning such as shall contribute to the expense—a community of interest in the piers to be sunk in proportion to the breadth of their respective lots, under such restrictions and regulations and within such limits as the corporation shall deem just and proper. Now, all this is only a mere power which the corporation have to exercise. They acquire no interest or ownership in the piers here spoken of, unless the individual proprietors of the lots fronting towards the river refuse or neglect to construct the piers. In such an event, the corporation may proceed to do the work at their own expense and then become the owners and receive the wharfage for all vessels lying at the piers or they may grant the right to others of making such piers and of receiving the wharfage. In the case of *The Corporation of N. Y. v. Scott*, 1. Caines R. 543. it was held, under the authority of these sections, as they were contained in the act of 1801. (2. Kent & Rad. 129. §. 1. 8.) that the corporation could not reserve or take to themselves any wharfage arising from a pier built at the expense of individuals, nor any slipage on the side of such pier adjacent to a public slip but not contiguous or on a line with the side of the slip. This decision was made in the year one thousand eight hundred and four. Two years afterwards the legislature passed an amen-

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datory law, which granted additional powers and rights to the corporation: 4. Webster & Skinner's ed. 514. The parts of this amendatory law most applicable take in the 228th. and 230th. § of the general law of 1813. And by the first of these, the corporation were authorized, at their own expense, to cause public basins to be formed and had power to take to their own use the wharfage and slirage, provided it did not deprive persons, who might have made piers by direction of the corporation, of any legal rights which they might have thereby acquired or interfere with any private rights of property or privileges held under grants of the corporation. The present, is not a case within this section: because, although the object of the corporation was to form a public slip or basin opposite to Fulton Market, they did not construct the pier in question at their own expense—nor, indeed, could they have done so, placing it where they did, without infringing private rights acquired and held under previous grants from them. Then, as to the 230. §., which declares that in all cases where the corporation shall think it for the public good to enlarge any of the public slips, they have full power to do so; and also, that upon paying one third of the expense of building the necessary piers and bridges, they shall be entitled to the slirage of the side of the piers adjacent to the slips and also to one half of the wharfage to arise from the outermost end of the piers. This section, as its words import, was intended to apply to the case of public slips already formed which the corporation might be desirous of enlarging by an extension of the piers or by sinking new piers at the sides of the mouth of the slips. And I do not see how, according to its literal meaning, it can authorize the making of a public slip in the first instance by sinking a pier or piers against the bulk-head or wharf opposite to private property.

But the difficulty still remains. The corporation appear to have proceeded upon the principle in this section precisely as though the case were within it; and the individual proprietors appear to have assented or, at least, acquiesced in this mode. They agreed to contribute two thirds of the expense of building the pier and the corporation the remaining third. It was erected upon such terms. The parties could not have

expected the corporation to assume and bear one third of the expense upon any other ground than that the westerly side of the pier was to be a public slip. There was no inducement for them to engage in the work upon these terms in case the pier, when built, was to be deemed entirely private property or individuals were to participate with them in the emoluments of the public slip on the westerly side. Nor was there any necessity, for the sake of public convenience, in having a pier constructed that the corporation should contribute to the expense of building one to belong exclusively to the owners of the contiguous upland. The statute gives the corporation a power of becoming owners or interested in piers in all cases where circumstances render it necessary for them to contribute to the expense. I must presume all parties were cognizant of the law and that, when the proprietors submitted to the terms and proceeded to build the pier at the joint expense of themselves and the corporation, they mutually understood the case to be one within the spirit, if not within the letter, of the 230. §. I consider, under the circumstances and from the fact of permitting the corporation to contribute one third of the expenses, that the individual proprietors must be deemed to have given a practical construction to this part of the statute from which they are not now at liberty to depart.

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It is said, however, that even if such would be the consequence, still it could only be so, provided the pier had been actually located and built where the resolution of the corporate board purported it should be, namely, at the foot of Crane-wharf Street; and that, by placing it on the easterly side and not directly opposite or at the foot of the Street, the corporation have been guilty of a mislocation, which gives them no right to the portion left clear on the westerly side and within the slip or basin. I do not perceive how the alleged mislocation can make any difference. All the parties interested in the pier must be presumed to have had a knowledge of its location from the time it was first sunk; and they could not but have seen its position in reference to Crane-wharf Street. And yet, with this before them, they permit the work to go on, without objection, and leave the corporation to pay one third of the expense and bear only two thirds

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issues and profits of my other real estate during her natural life, in lieu of and in bar of all claims of dower upon my said estate. Secondly, I do give, bequeath, devise and dispose of all my estate, real and personal, of whatsoever nature or kind the same may be, and the rents, issues, profits, income and interest thereof unto my brother Jonathan Cogswell of Berlin in the State of Connecticut and Sister Lois Cogswell of the City and State of New York jointly during their lives and to the survivor of them during his or her life and to such person or persons, after the death of the survivor of them, as a court of equitable jurisdiction in the State of New York may appoint, in trust nevertheless for the uses and purposes hereinafter expressed and declared concerning the same, that is to say: Thirdly, to permit my said wife to take the interest or dividends on three thousand pounds sterling British Government three per cent. stock during her natural life.

Fourthly, to invest in stock of the United States or of the State of New York or such other Bank Stock as my said wife shall approve of, a sum of money as shall produce the annual income, dividends or interest of one thousand dollars lawful money of the United States of America; and from time to time as the same shall become payable to permit my said wife to take such interest moneys in the whole amounting to the said annual interest of one thousand dollars as aforesaid.

Fifthly, after deducting therefrom the provision above made for my said wife, to permit my said brother Jonathan to take and enjoy during his natural life the one third of the nett rents, issues and profits of my real estate.

Sixthly, after deducting therefrom the provision made for my said wife, to permit my said sister Lois to take and enjoy, during her natural life, the one third of the nett rents, issues and profits of my real estate.

Seventhly, after the death of my said wife, I do give and devise the House and lot number 26 Varick Street to my Niece Mary Cogswell, the daughter of my said brother Jonathan, and her heirs, so as the same be not subject to the debts, control or management of any husband with whom she may intermarry: but in case my said niece should die without

leaving lawful issue, that the said house and lot shall become a part of the residue of my estate, and become subject to the disposition thereof herein after mentioned.

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Eighthly.—After the deaths of my said wife, my said brother Jonathan and sister Lois, and as they shall respectively die, I do give and devise to my niece Louisa Cogswell, the daughter of my said brother Jonathan, and her heirs, so as the same be not subject to the debts or the control and management of any husband with whom she may intermarry, the lots numbers 79 and 80 in Charles street as marked on a certain map of property in the Ninth Ward of the city of New York, heretofore belonging to the Corporation of said city, with all the buildings belonging to me erected thereon, that is to say, one-third part thereof upon the death of my wife, one third part thereof upon the death of my brother Jonathan, and one other third part thereof upon the death of my said sister Lois.

Ninthly.—After the death of my said wife, my said brother Jonathan and sister Lois, and as they shall respectively die, I do give and devise to my niece Ann W. Cogswell, the daughter of my brother Jonathan, and her heirs, so as the same be not subject to the debts or the control and management of any husband with whom she may intermarry, the lot number 85 in Charles street, as marked on the said map of property in the said Ninth Ward of the said city heretofore belonging to the Corporation of said city, with all the buildings belonging to me erected thereon, that is to say, one-third part thereof upon the death of my said wife, one-third part thereof upon the death of my brother Jonathan, and one other third part thereof upon the death of my sister Lois.

Tenthly.—I do give, devise, bequeath and dispose all the rest, residue and remainder of my estate, real and personal, that I may be seized or possessed of, to my nieces Mary Cogswell and Elizabeth L. Cogswell, the children of my said brother Jonathan, and their heirs and assigns, so as the same be not subject to the debts or the control and management of any husband with whom either of my said nieces may intermarry.

Eleventhly.—In case either of my said four nieces above named shall die without leaving lawful issue, that then and in such

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case I do give, bequeath and devise the parts or proportions of my said estate, real and personal, for such niece or nieces, to the children of my brother Jonathan their heirs and assigns, as tenants in common.

Lastly, I do nominate, constitute and appoint my said brother Jonathan Cogswell and my said sister Lois Cogswell, trustees of my said real and personal estate for every purpose both in law and equity, and also the executor and executrix of this my last will and testament; hereby revoking all other and former wills by me heretofore made. In witness, &c."

A codicil, dated the thirteenth day of December one thousand eight hundred and thirty-one, accompanied the will, and was in these words: "I do hereby give and bequeath to my dear and beloved wife Mary and her assigns, the household furniture, kitchen stuff and implements of household in the house No. 26 Varick street, where I now reside; Also the plates, plate, glass and earthenware, beds, bedsteads, bed covering whether of lincn, cotton, woollen or silk, bed and window curtains; And also all the wine belonging to me at the time of my death, in the said house or the cellars or vaults thereof. I give and bequeath to my brother Jonathan Cogswell and sister Lois Cogswell and to the survivor of them, and upon the death of such last survivor to such person or persons as a competent equity jurisdiction in the State of New York shall appoint, the sum of ten thousand dollars to be taken out of the residue of my estate, upon trust nevertheless to be invested in stock of the United States or of the state of New York or any other stock of approved stability for the uses of my nieces Louisa Cogswell and Ann W. Cogswell, so as not to be subject to the debts, control or management of any husband with whom they may intermarry, the interest whereof to be paid to them on their separate receipts in equal moieties as the same shall from time to time be received. And in case of the death of either or both of them my said nieces, without leaving lawful issue, that the moiety in case of the death of one of them or the whole in case of the death of both of them, I give and bequeath to the surviving child or children of my said brother Jonathan and their assigns; but in case either of my


said nieces shall die leaving lawful issue, then I do give and bequeath to said issue the moiety which would have belonged to the parent so dying. I do give and bequeath unto my brother Wade Cogswell an annuity of one hundred and fifty dollars to be paid to him semi-annually during his life. I give and bequeath unto my said brother Jonathan and sister Lois and to the survivor of them, and upon the death of such last survivor to such person or persons as a court of competent equity jurisdiction in the state of New York shall appoint, the sum of two thousand dollars, to be taken out of the residue of my estate, upon trust, nevertheless, to be invested in United States Bank stock or any other bank stock of approved stability, for the use of my niece Elizabeth Cogswell, the daughter of my brother Wade Cogswell, the interest of which to be paid to her from time to time as the same becomes due; but in case of her death leaving lawful issue, I do give and bequeath the principal stock to such issue; but should my said niece die without leaving lawful issue, I do give and bequeath the said principal stock to the children of my brother Jonathan. In witness, &c."

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The testator died on the thirteenth day of November one thousand eight hundred and thirty-two; and his will, with the codicil, was duly proved.

He left a large real and personal estate, amounting to more than two hundred thousand dollars. As to the real estate, there was the house and lot known as No. 26 Varick street; five lots and houses in Cedar street, of which one was under mortgage for ten thousand dollars; three lots in Charles street, of which two were vacant and the remaining one was built upon; two lots on Chappel street, one of them had been bought for three thousand eight hundred dollars, and only five hundred dollars had been paid upon it and the balance became due by the contract when the deed should be given, and the other was an old store which required to be pulled down and a new edifice erected; and ten vacant lots on Front street under mortgage for two thousand six hundred and ninety dollars. It also appeared that ten feet had been taken by the Corporation from the buildings in Cedar street, and that it would cost thirty thousand dollars to rebuild them.

1834.  The advice and direction of the court were now asked, upon the following points—
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1st. As to the time from which Mrs. Cogswell, the widow, was entitled to dividends on the three thousand pounds sterling and her annuity of one thousand dollars; and also as to the time from which Louisa Cogswell and Ann W. Cogswell were entitled to interest upon ten thousand dollars?

2nd. As to who were to bear the burthen of the two mortgages on the estate and in what proportions; and how and by whom the principal and interest of such mortgages were to be satisfied?

3rd. As to how and by whom the bargain for the purchase of the lot in Chapel street was to be completed; and out of what fund the balance due thereon was to be paid?

4th. Whether an old store-house consumed by fire in Chapel street was to be rebuilt and out of what funds?

5th. Whether the four buildings in Cedar street, about to be demolished by the widening of the street, were to be rebuilt and out of what funds—or what other disposition was to be made touching the said premises?

6th. Whether any and what improvements were to be made on the lots in Front street and Charles street; and if so, out of what funds?

The bill was filed against the widow of the testator and devisees, Mr. Kinney having married one of the latter.

Mr. G. Griffin, for the complainants.

Mr. J. W. Gerard, for the infant defendants.

Mr. S. Sherwood, for the defendants Franklin S. Kinney and wife (late Mary Cogswell.)

February 17. THE VICE-CHANCELLOR:—I. The first question raised by the bill in this cause, upon which the complainants ask the advice and direction of the court is: from what time Mrs. Cogswell, the widow, is entitled to the dividends on the three thousand pounds sterling British government three per cent. stock.

I infer, from the manner in which this is mentioned in the

will, that the testator possessed the particular stock at the time of his death. He does not direct the trustees to make an investment for that purpose, as in other instances where he is desirous of creating an income for annuities; but the bequest is specifically of the interest or dividends upon three thousand pounds sterling British Government three per cent. stock, which the trustees are to permit the widow to take during her natural life. I am of opinion, as the will takes effect from the death of the testator, the widow is, from that time, entitled to the dividends, that is to say, the dividends which may accrue or be declared or become payable at any time after the death of the testator.

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II. Next, as to her annuity of one thousand dollars. This is to arise, not from an investment already made, but one to be made in stock of the United States or of this State or of some bank; and as the testator has not appointed the time within which the investment should be made, I think the executors may take one year for the purpose, in analogy to the time allowed by law for paying legacies: 2. R. S. 90. §. 43. The gross sum to be set apart to produce the yearly income of one thousand dollars is considered in the light of a legacy payable by law at the end of a year: 1 Roper on Leg. 588.; and consequently, the widow can only demand the income to accrue from it as commencing at that time, and she will be entitled to receive such interest or income quarterly, half-yearly or annually thereafter as dividends are declared. This, I think, is the plain meaning of the will.

III. The same may be said of the investment of one thousand dollars directed by the codicil to be made in like manner for the use of the two nieces Louisa and Ann W. Cogswell; and the like rule must be adopted with respect to the commencement of the interest payable to them. There is no difference in principle.

IV. Then, as to the two mortgages existing on parts of the real estate. The question is, who are to bear the burthen of them, and in what proportions and how and by whom are the principal and interest of such mortgages to be satisfied?

By the R. S., 1. vol. 749. §. 4., the devisee of real estate, subject to a mortgage executed by the testator, is bound to satisfy and discharge it out of his own property, without re-

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sorting to the executor, unless there be an express direction in the will to the contrary. Here there is no such direction. A life estate in the house and lot in Cedar street (encumbered by a mortgage of ten thousand dollars, being one of the the houses there situated of which the testator died seized) is given, under the trusts of the will, to the widow of the testator and to his brother Jonathan and sister Lois in equal thirds; and by the residuary clause, an estate in fee in remainder in the same property is given to the two nieces Mary and Elizabeth L. Cogswell, subject to the contingency of their dying without issue. The same is the case with respect to the ten vacant lots on Front street, which are under a mortgage of two thousand six hundred and ninety dollars. Now, as between the tenants for life and those entitled in remainder, the former are bound to keep down the interest on the mortgage debts, and they must contribute alike out of their respective shares of the rents and profits during life to pay the interest on those sums. As the life-estates fall in, the principal sums remain a charge upon the inheritance and must be borne by those who succeed to it. The tenants for life are not bound to extinguish the incumbrances. They are only to keep down the annual interest: 4. Kent's Com. (1. Ed.) 72. 73.; and as a consequence of this rule, in case the mortgagees should call in their money or if it should be found expedient to pay them off out of the residuary personal estate belonging to the nieces Mary and Elizabeth, they will be permitted to stand in the place of the mortgagees so far as to collect the interest payable by the tenants for life.

It appears that the executors have already paid off the mortgage of ten thousand dollars. The life-estates must bear the interest which accrued upon it from the death of the testator to the time of such payment; and they must continue to be charged with the interest on the principal sum in the same manner as if the mortgage remained. And the same rule must be observed with respect to the two thousand six hundred and ninety dollars whenever that mortgage shall be paid.

V. As regards the contract for the purchase of the lot in Chapel street: by whom is it to be completed and out of

what fund is the balance of the purchase money to be paid ?

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Upon the principle that equity considers that as done which is agreed to be done and that from the time of entering into an effectual contract for the sale of lands the purchaser is looked upon as the owner, so that in the event of his death the land descends to his heir or may be devised in his will : the change being as complete under a contract in the view of a court of equity as though the legal title had been conveyed : Jeremy's Eq. Jur. 446, there can be no doubt but this lot is included in the devise of the life-estates before mentioned and of the remainder to the same two nieces. The balance of the purchase money unpaid stands as a debt against the testator which the executors must pay out of the personal assets like any other debt, unless it shall be found most advantageous to those interested in this part of the estate to rescind the contract with the vendor if he will consent. But I see nothing to prevent the tenants for life from insisting that the purchase shall be completed for their benefit. The title will, of course, be taken to the executors in trust for the purposes of the will. The circumstance that the old store house which stood upon this lot has been destroyed by fire since the death of the testator, does not give the tenants for life a right to have it rebuilt at the expense of other parts of the estate : because the lot as vacant is proved to be as valuable as it was with that building standing upon it.

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VI. Another question is : whether any and what improvements are to be made upon the Chapel Street lots, the lots in Front Street and those in Charles Street ; and if so, out of what funds ? Most of these are vacant lots. Such buildings as are standing upon any of them are of little value, and the property, in its present condition, is bringing very little income. Still, this affords no sufficient reason for applying the residuary personal estate to the erection of new buildings or the making of improvements on the lots for the benefit of the life-tenants. The testator has given no directions to this effect ; and the parties must be content to take the property in the condition in which it happens to be at the death of the testator. They are at liberty to make leases for their lives, and to do any thing they please with the property for their own benefit not amounting to waste or inju-

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ry to the inheritance—and this too without requiring any direction or authority from the court for the purpose. If the interest of the money for which the lots would sell should be deemed better than any rents which can be obtained for the lots, a sale, perhaps, under the law of partition, may be effected; and in that event the proceeds can be invested upon security at interest during the continuance of the life estates for their benefit—but, at present, the court has nothing to do with that matter.

VII. The remaining question to be considered is: whether the four buildings on Cedar Street, about to be demolished by the widening of that street, are to be rebuilt; and if so, out of what funds—or what other disposition are the trustees to make of this portion of the property?

The Corporation of New York take off ten feet from the front of the lots to widen the street. This proceeding is subsequent to the death of the testator and it has produced an alteration in the condition of the property not foreseen or provided for in the will. Whatever advantage results from an increase in the annual value of the property in consequence of the lots becoming more valuable as scites for ware-houses, and which is abundantly proved, the tenants for life are entitled to. On this point there is no dispute. But how are they to avail themselves of it? Warehouses are the proper buildings to be erected on the lots, in order to bring the best income. This is likewise proved. The persons having the life-estates cannot be required to erect buildings at their own expense; nor, under leases of so uncertain a tenure, as for lives only, can lessees be found who will pay a reasonable ground rent and at the same time, put up buildings of the proper description, and be obliged to remove or leave them at the expiration of the leases, without being compensated for their cost or value.

It is said, however, that, upon leases for a term certain, not less than twenty-one years, requiring the lessees to construct such buildings as they may think proper, with the privilege of removing them at the end of the term, a ground rent of one thousand dollars per annum for each lot may be obtained; and testimony to this effect is produced. But the difficulty in this case is, that the life-estates may cease before the ex-

piration of leases, granted for a term certain, as for twenty one years, and in that event it may be injurious to those in remainder when they come into possession to find the inheritance incumbered by an outstanding term; and so, on the other hand, the life estates may possibly continue beyond the expiration of such leases—in which case, the lots may be left vacant upon their hands and unproductive for the residue of their lives. It is true, this last difficulty may be obviated by granting leases in the first instance for the term of twenty-one years at all events, and for as much longer as the life estates or any of them shall continue.

Yet, this term of twenty-one years certain cannot be granted safely, because those entitled upon the dropping of the life estates are now infants and will not be bound by any assent of their guardian *ad litem*; nor is there evidence before me to show that their interest requires the court should undertake to bind them by its decree to the observance of such contracts. The only other method proposed, and it appears to me to be the one liable to the least objection, is that the trustees should be allowed to appropriate about thirty thousand dollars of the residuary personal estate to the erection of new substantial ware-houses upon the four lots, each building to cost (according to the testimony of what will be suitable and proper in this respect) about seven thousand five hundred dollars, reserving an interest of six per cent. upon the actual cost to be paid out of the rents and in addition thereto a reasonable allowance for the natural depreciation and wear and tear of the buildings until the life estates shall fall. In this way, the tenants for life will receive the "nett rents and profits" of this portion of the estate and, in the meantime, the money expended in buildings will be a safe investment and drawing interest (the tenants for life keeping the buildings insured and paying the taxes) and upon the determination of the life estates, those to whom the money invested will belong, come into the possession of the same in the permanent improvements upon the lots—somewhat lessened in value, it is true, but the depreciation compensated for in the allowance made for the purpose. This appears to be just and equitable on both sides. I shall, therefore, adopt it.

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There must be a reference to ascertain the proper allowance to be made by the tenants for life on account of the depreciation in the buildings. For this purpose, the master must ascertain the probable duration of the lives, taking an average of the three, and how much less the buildings will be worth at that time from natural causes and ordinary use than when new and this amount he must apportion to be paid out of the rents in such manner as may be just.

The question of costs and further directions are reserved. Order accordingly.

O'BRIEN and Wife v. HEENEY, surviving executor of Reed, deceased.


Where executors have accounted under an enrolled decree in a prior suit, the same is conclusive against them so far as it adjudicates upon the rights of complainants in an after-suit instituted by them and founded upon such decree.

Although personal property is acquired by a testator after the making of his will, yet it passes under it, provided words sufficiently comprehensive are used or the context shows he did not intend to die intestate as to any part.

Where it is clear, from the intention of the testator, that the word *or* is used instead of *and*, and *conversae*, the court interposes to change the word.

Where the court has to determine whether, under a will B. and M. take estates in fee or for life with remainders and also whether their children take remainders for life or in fee (out of the same property): it will be necessary to bring both B. and M.'s children and their representatives before the court as parties.

If it is perceived after a full hearing that an effectual decree cannot be made, the cause can be ordered to stand over to add parties.

January 27, 1834.

Decret.
Will.
Parties.

THE Bill of Complaint in this cause was filed for an account of the Personal Estate and of the rents and profits of the Real Estate of Matthew Reed, deceased, devised by his last will and testament.


The Bill had been taken as confessed and two successive orders of Reference were made in this cause.

Matthew Reed, the testator, died in the city of New-York in the month of November one thousand eight hundred and eleven. Harriott, the wife of the testator named in his

will, also died before her husband. Matthew Reed, the son of the testator also named in the said will, survived the testator, but died sometime in the year one thousand eight hundred and fifteen or one thousand eight hundred and sixteen, unmarried and without issue.

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The testator, Matthew Reed, at the time of his death, left neither father nor mother, and his only next of kin then living were his two sisters named in his will, Bridget O'Brien and Mary Matthews, who then resided in Ireland, natives of that country, and neither of whom were at any time in the United States. Bridget, one of the sisters of the testator, had several children at the time of making the will and at the death of the testator and of Matthew Reed the son, the names and number of whom were unknown. Mary Matthews, the other sister of the testator, had the following children to wit: Michael, Ann, James, Cornelius, John, Patrick, Matthew, Bernard and Bridget, at the time of making the said will and at the death of the testator and Matthew Reed, the son. The said Mary Matthews died in Ireland in the month of January one thousand eight hundred and twenty-eight, leaving, by her will, bearing date the eleventh day of that month, (among other things) to her children Bernard and Bridget Matthews an equal share of whatever sum or sums of money might be arising out of the estate of her late brother the said Matthew Reed, and that might thereafter be sent for her by the executors of the said Matthew Reed; and by her said will bequeathed to her said sons, the said Michael, James, John, Cornelius, Patrick and Matthew and her daughter Ann Flynn, each one shilling; and appointed the Reverend Charles S. Boyle and her son Bernard Matthews to be executors. The house and lot of land designated in the will of the said Matthew Reed deceased, by the No. 323 Pearl Street, had not been sold by the executors of his will or otherwise disposed of. The rents of the said premises were collected by them after the death of the testator and were accounted for by them to the said Bridget O'Brien and Mary Matthews, the two sisters of the said Matthew Reed deceased, during the life-time of the said Mary Matthews; and since the death of Andrew Morris and Charles M'Carthy, two of the executors of the said Matthew Reed, and the survivor-

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ship of the defendant Cornelius Heeney, the rents of the said premises had been received by him. The testator, at the time of his death, was possessed of divers stock in the State of New York and New Jersey, among which were one hundred shares of the capital stock of the Mechanics Bank of the City of New York, on which the dividends or interest had accumulated since that time until the payment of the last dividend previous to the twenty-ninth day of June, one thousand eight hundred and thirty-three, when such accumulated interest, amounting to the sum of three thousand seven hundred and fifty dollars, was received by the said defendant as such surviving executor. The said Mechanics' Bank was incorporated on the twenty-third day of March in the year one thousand eight hundred and ten, and went into operation sometime during the year; and the said stock was acquired by the said Matthew Reed, deceased, by his original subscription as a stock-holder. John Matthews, one of the children of Mary Matthews, was naturalized in the year one thousand eight hundred and twenty —, and remained in the city of New York.

An action was instituted in ejectment by John Matthews, in February one thousand eight hundred and twenty-nine, in the Supreme Court of the City of New York; and one thirtieth of the premises in question was recovered by him after argument before the judges of that court, and since which time he had received the rent of the premises.


The said Harriott, the wife of the testator, died in his lifetime, but was not the mother of the said Matthew, the son of the testator, who was an illegitimate child.

Several questions upon the will now came before the court; and they may be found referred to in the latter part of the Vice-Chancellor's opinion. But a bill against the executors, including the present defendant, had theretofore been filed, and a decree of the court was made thereunder on the twenty-ninth day of November one thousand eight hundred and twenty-two, enrolled on the ninth day of June one thousand eight hundred and twenty-three, and which established the right in the share and interest now claimed by Bridget O'Brien. That was a bill filed by Mary Matthews, the sister of Bridget and the testator, as one of the residuary legatees named in the

will, for an account. It claimed, for her share, one-third of the clear personal estate and one-third of the rents and profits of the house and lot No. 323 Pearl street, from the time of the death of Matthew Reed the son, to whom the house and lot were devised for life—upon the allegation of his having died without being married or without leaving issue; and the bill prayed, among other things, that the house and lot might be sold and the proceeds divided between the complainant therein and her sister Bridget O'Brien—she, the complainant, taking a third. Both the answer of the present defendant, Heeney, and of his then co-executor, Andrew Morris, to the said bill expressly admitted her right and they submitted to account for the property of the estate as far as it had come to their hands. No objection had been raised to the taking of the accounts generally. But neither Bridget O'Brien nor any other persons interested as residuary legatees or devisees were parties and, therefore, could not be bound by the decree. An order of reference had been made; the accounts were investigated and stated by a master; an elaborate report was made upon the principle that Mary Matthews was entitled as a residuary legatee to one-third of the nett estate and that Bridget O'Brien was entitled, as the other legatee, to the remaining two-thirds; and certain balances found to be due from the executors respectively or ascertained to be in their hands were, by the master's report, apportioned between the two sisters as such legatees. No exceptions were taken to the report. Upon its confirmation, the decree was made directing the balances in the hands of the executors to be paid over to Mary Matthews and Bridget O'Brien or to their solicitors or attorneys in the proportions to which they were respectively entitled as before mentioned, and that certain stocks belonging to the estate remaining unsold should forthwith be sold by the executors and the outstanding debts collected by them, as far as the same could be done, and the avails be then paid over in the same proportion, namely, one-third to Mary Matthews and two-thirds to Bridget O'Brien or to their respective solicitors or attorneys. The decree then directed that the two executors, Morris and Heeney, should, when required by either of such legatees, sell and dispose of the real estate, including the house and lot No.

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1834.  323 Pearl Street, and divide and pay over the proceeds in the proportions before mentioned; and that until such sale they should receive and pay over the rents in like manner, commencing, as to the house and lot in Pearl Street, with and including the quarter's rent due on the first day of November, one thousand eight hundred and twenty-two—the previous rents having been brought into the account.

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Mr. A. L. Robertson, for the defendant.

Mr. H. Maxwell and Mr. H. S. Machay, for the complainants.

October 6th. THE VICE-CHANCELLOR:—Although Bridget O'Brien was not nominally a party to the suit and, therefore, would not be bound by the decree if she should set up claims at variance with or adverse to it, yet, as she might have come in under the decree and claimed the benefit of it if she had chosen to do so or have filed a bill to enforce it or to establish rights similar to those admitted and declared by the decree, the latter must be considered binding and as evidence conclusive upon the executors and each of them, so far as it adjudicates upon the rights of the complainants or settles the principles upon which those rights are founded: *Borough v. Whichote*, 3. Bro. P. C. 595.; and see *Shepherd v. Towgood*, 1. Turn. & Russ. 379.

If the defendant wished to avoid the binding effect of the decree, he should have proceeded to impeach it for error or mistake, by showing sufficient cause for opening the enrolment or for reversing it: but in a suit founded upon the decree or in a collateral proceeding where the decree is admissible evidence, the defendant is not at liberty to question its correctness.

In the present case, the bill is not founded upon the decree, with a view of enforcing the performance of the matters already decreed against the defendant as an executor: but the object of the bill is to establish a right to two-thirds of the estate both real and personal and for an account; and the former proceedings and decree upon the bill of Mary Matthews are given in evidence to show that a right to this extent exists.

As the case now stands, the former decree is evidence of such right ; and it settles the question, as against the executors, in respect to what passed by the will, also what they were liable to account for to Mary Matthews and Bridget O'Brien, as residuary legatees, and the share and interest of Bridget as well as of Mary in the estate since she now claims upon the same grounds and under a similar construction of the will which was then set up and admitted to be correct. A different decree now upon these points would be inconsistent with the former and, therefore, cannot be made.

The master's report in the present case to which exceptions are taken is in conformity with the principles contained in the former decree ; and for the reasons already given, I should think the defendant is not at liberty to controvert it. But viewing the questions presented by the exceptions upon their own merits, independently of the former decree, and I am satisfied the master has decided correctly so far as I shall now undertake to examine his report.

The first exception to it is, that as to certain portions of the personal estate, to wit, the stock of public incorporated companies and plate, there was an intestacy—no person being entitled to them under the will, and, consequently, the executors became possessed thereof in trust for the next of kin. Among some of the stock (some of which the executors disposed of and accounted for in the suit of Mary Matthews) the testator owned one hundred shares in the capital stock of the Mechanics' Bank, and of which the executors at that time were ignorant ; but having since discovered it, Mr. Heeney, as surviving executor, has received the dividends which had been accumulating for many years—amounting to upwards of three thousand dollars. These shares the testator subscribed for on the incorporation of the bank in the year one thousand eight hundred and ten and after he had made his will. But the objection is, not that the stock did not pass by the will on account of its being subsequently acquired property :—such an objection cannot be taken in regard to personalty. A will speaks from the time of the testator's decease ; and whatever property of a personal nature he then owns passes under it : provided words are used suf-

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sufficiently comprehensive to include all within the bequests or the context of the will shows that the testator intended to dispose of the whole of his personal estate and not to die intestate as to any part.

It is true, in disposing of the residuary personal estate, that there is no direct devise or bequest of plate or bank stock or of money invested in stocks or funds of any kind and probably for the reason that at the time the will was written the testator held no property of this description other than what he specifically bequeathed. But, taking the whole of the will together and it is evident, from the manner in which the property is disposed of and the way in which it is to be divided, after satisfying the specific bequests and the pecuniary legacies, that the testator did not intend to leave any thing undisposed of by his will; and the court is warranted in adopting the construction which the executors, acting under the advice of their counsel on the former occasion certainly adopted, that the whole of the testator's personal property passed to them or to the legatees pursuant to and under the authority of the will and that they took no part of the property in trust for the next of kin. I am in favor of overruling the first exception.

The second and third exceptions are intended to present the question, whether the children of Bridget O'Brien and those of Mary Matthews are not tenants in common with their respective parents in the rents and profits of the house and lot No. 323. Pearl Street since the death of Matthew Reed the son and to whom it was devised for life.

The testator says, in the event (and it has happened) of the son's death without issue to take the remainder, "then the rents of said house to go to my two sisters in Ireland, viz. Bridget O'Brien and Mary Matthews or to their children, that is to say, one-third to my said sister Mary or to her said children, and two-thirds to my said sister Bridget or to her children." In order to make the children take at the same time with the parent under this devise, the word "*or*" must be read *and*: for, as the will is worded, it indicates that the children are to take substitutionally and not simultaneously with them; and in order to give the devise the latter meaning, the phrase must be changed from the disjunctive to the

conjunctive. This is sometimes done where the whole sentence in a will would be otherwise uncertain or unintelligible and it is evident *or* is used for *and*, and *vice versa* through mistake; and upon the principle of correcting the mistake and of effectuating the intention and giving validity to the bequest, the court interposes to change the word: still, unless it is clearly authorized by the intention and meaning of the testator, as collected from the whole will, no alteration will be made: 2 Roper on Leg. 290.

In the case of the will under consideration, I am satisfied no alteration or change is called for. As the words stand, they are susceptible of a fair legal construction and this without adopting the conclusion that the testator meant the children to take during the lifetime of their mothers and in common with them; and there is nothing in the will to show that such was his meaning. Indeed, on the contrary, the obvious intent is that they were not to take at the same time and in common with them.

I am of opinion the master has decided correctly when he reports that Bridget O'Brien is entitled to two thirds of the rents and profits of the house No. 323, Pearl Street and that her children are not entitled to participate in the same with her as tenants in common or otherwise under the will. And so with respect to Mary Matthews and her children, in relation to the remaining one third: that during her life her children were not entitled to share with her as tenants in common or otherwise under the will. Upon this basis it is that the accounts of the rents were taken in the former cause—excluding the children from any share or participation with their mothers. The apportionment between them as the persons solely entitled, was decreed. Altho' I have chosen to examine this question, yet I consider the defendant precluded from raising it in the present suit. The second and third exceptions, so far as they go to the point, should be disallowed.

But there are other questions which cannot be passed over. Thus, taking those words of the will as we find them: "or to their children" and it becomes a question whether they operate as words of limitation and give to the first takers, Bridget O'Brien and Mary Matthews, estates in fee or mere life estates, with remainders to children either for life or in

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fee? *vide Montagu v. Nucella*, 1 Russ. 165. The master considered the will as having converted the real estate into personalty and that the rents and the proceeds of the house and lot when sold under the power and trusts of the will were to be disposed of as personal estate and also that Bridget O'Brien and Mary Matthews became entitled absolutely to their respective shares; and as a consequence of this, upon the death of Mary Matthews, one third of the rents, until the house and lot should be sold and one third of the money to arise from the sale when made, would be at her disposal and pass by the will made in Ireland in favor of some of her children to the exclusion of others of them, and her executors be entitled to receive the one third of the rents and of the avails of the house and lot when sold. It appears, however, that John Matthews, one of her sons, who is excluded by her will, having become a naturalized citizen, has, since the death of his mother, recovered, in an action of ejectment, commenced in the Superior Court of the city of New York, an undivided thirtieth part of the house and lot—claiming title, as I infer, under the will of his uncle Matthew Reed, as one of the devisees in remainder and has been in the possession and receipt of such a proportion of the rents and profits.

Here, then, it is obvious that the questions to which I have just adverted cannot be settled by a decree in the present state of this suit. All persons having or claiming any interest should first be made parties: John Matthews, for instance, is a necessary party; while the other children of Mary Matthews and her personal representatives should be brought in before an effectual decree can be made touching the account and disposition of one third of the rents since the death of Mary Matthews and the sale of the house and lot and the division of this portion of the proceeds. With respect to Bridget O'Brien, there would be no difficulty, even at present, in ordering the defendant, as surviving executor, to account to her during her life for two thirds of the rents: but beyond this, no safe decree can be made—for, claims may be set up by some of her children after her death similar to those asserted by John Matthews; and it is, therefore, important to have all proper parties before the court when a decision is had upon the questions now presented and I cannot but think the children of Bridget O'Brien are of the number.

The decree in the former cause of Mary Matthews was an imperfect one, for the want of parties—as is manifest from what has since taken place: and to undertake, in the present suit, to determine questions in which persons not before the court are concerned would be another nugatory act. It is surprising that in neither case has the objection been taken by the defendants. Still, where it is perceived, even after a full hearing, that an effectual decree cannot be made, the court may take it upon itself to order the cause to stand over for want of parties: *Jones v. Jones*, 3 *Atk.* 111.

If the complainant is content to have a decree for an account of two thirds of the personal estate which has come to the hands of the defendant, and not heretofore accounted for, and for two thirds of the rents of the house, No. 323, Pearl Street; (and which, I think she is, at all events, entitled to receive, so long, during her life, as the property remains unsold,) the cause may be sent back to the master simply to take such an account. If more be asked, it must stand over to add parties.

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WILLIAM H. HARRISON, administrator *de bonis non*, &c. of
ROBERT M. HARRISON, deceased, and MILLER, adminis-
trator of CHARLES HARRISON and SAMUEL H. LITTLE-
JOHN, deceased, v. MC. MENNOMY and others.

Parol evidence is admissible to prove a trust in opposition to an absolute deed or written instrument: but it must be evidence of so positive a character as to leave no doubt of the fact and, at the same time, so clearly define the trust that the court may see what is requisite for its due execution.

Money was left by H. with M. under a parol request to put it out at interest and let it accumulate until the youngest of certain children attained 21, when the same was to be divided amongst the survivors. M., fearing misfortunes in his business, executed his own bond and mortgage to these children. This transaction is not a mere loan of money, but a special deposit for investment and accumulation.

Money so deposited remains the property of M. and subject to her will; and as she afterwards bequeathed all her estate to the said children, with a reservation of the share of a party dying to such one's issue, and some of them died leaving children: *It was held*, that a bill of foreclosure and sale against M. could not be sustained by the personal representatives of the parents who had left issue.

An objection of substance by a defendant can be first raised upon a re-hearing, even though it may prove fatal to the whole bill.

Feb. 12th,
1834.

Mortgage.
Trust.
Parties.
Rehearing.

Bill of foreclosure and sale of mortgaged premises. It had been filed in the names of Isabella J. Harrison, widow

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and administratrix of Robert M. Harrison, deceased, and Silvanus Miller, administrator as well of Charles Harrison as of Samuel H. Littlejohn, deceased. Isabella J. Harrison died during the pendency of the suit; and William H. Harrison, as administrator *de bonis non* of her husband, was made a party complainant.

The mortgage, with a bond, was executed by the defendant, Robert Mc. Mennomy, to Hannah Harrison, Charles Harrison, Robert M. Harrison, Elizabeth Harrison and Ann Evelina Harrison, who were children of Robert Mc. Mennomy's sister Margaret Harrison; and all infants, saving Hannah, at the time these securities were given. The bond was made in the penal sum of four thousand dollars, with a condition to pay to the obligees, Hannah Harrison, Charles Harrison, Robert M. Harrison, Elizabeth Harrison and Ann Evelina Harrison, "or either of them, their or either of their executors, administrators or assigns the sum of fifteen hundred dollars, with lawful interest for the same at or before the time when the youngest survivor of them should arrive at the age of twenty-one years."

Elizabeth married Samuel H. Littlejohn; and then died—leaving the husband and one child her surviving. Samuel H. Littlejohn afterwards died; but the child still lived. Robert departed this life after having married and had children. Charles died intestate, without issue.

Ann Evelina, the youngest of the mortgagees, came of age in the month of August one thousand eight hundred and twenty-five, and was now the wife of Benjamin S. Fowler—both being defendants.


The answer of the defendant Robert Mc. Mennomy, set up, as the consideration upon which the bond and mortgage were founded and as being the intent of the instruments, that the mother of these children while a widow and having a sum of money on hand, amounting to about eleven hundred and seventy-five dollars, delivered the same to this defendant to put out at interest, and, by a speculation in stocks, he increased the same to fifteen hundred dollars. That this money was left in his hands, with verbal directions to put it out at interest and let it accumulate until the youngest of her children should arrive at twenty-one years of age; and then

he was to divide the principal and interest monies equally among such of them as should be living—while the right of a deceased party was to die with him. That being a merchant largely engaged in business and becoming apprehensive the money might be lost by misfortunes in business, he, the defendant, directed a bond and mortgage to be made out for his own execution and so as to secure to the survivors of the children the principal and interest when the youngest came of age. He had executed the bond and mortgage without examining them particularly and presumed, when he did so, that they had been drawn according to directions, and which were given in exact conformity with the prior wishes of the mother. That when he executed the bond and mortgage, he thought they had been prepared so as to secure the payment of money to those of the obligees who should be living when the youngest of them attained the age of twenty-one years; and these documents, after execution, had been handed to Charles Harrison, upon the understanding of its being a family affair and so that the mortgage was not to be recorded until circumstances required it. That about the year one thousand eight hundred and thirteen, Charles Harrison passed them over to Hannah Harrison, who kept them until the month of November one thousand eight hundred and nineteen, when this defendant acknowledged the execution of the mortgage and caused it to be recorded. He was still under the impression of the condition being as before stated; and declared that the giving of the bond and mortgage proceeded from his own suggestion and was intended merely as a memorandum of such a condition.

In order to prove this condition the defendant produced several witnesses. All of them, however, except one, spoke from hearsay and did not testify from personal knowledge or authentic information. The one witness, whose testimony was not liable to the same objection, was Hannah Harrison. Although a party defendant in the suit, she had been examined after releasing all her interest in the bond and mortgage to the defendant Mc. Mennomy. Her testimony was as follows, that she was not present when the money was delivered to her uncle, the defendant, Robert Mc. Mennomy, and did not hear her mother's instructions to him as to the dispo-

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sition of it, but afterwards her mother instructed him, "to put out the money and from time to time to add the interest to the principal until the youngest child became of age, when it was to be divided amongst such of the children as should be then living, unless circumstances should occur of which her mother was not aware—and should those circumstances occur, then Mr. Mc. Mennomy was to dispose of the money in the same manner that he might suppose her mother would do if living." This had always been her impression from what she had heard her mother say. On cross-examination she qualified this, by stating she could not be certain as to the words used by her mother in relation to the disposition of the money, but the substance was, it should be appropriated for the benefit of her children when the youngest surviving child came of age; and the witness's impression at the time was that the children of her mother were to be benefitted by the money; but whether the issue of any of them in case of death before the youngest of the children came to age were to benefitted she did not know, she had never thought of that nor given it any reflection.

The complainants produced in evidence the will of Margaret Harrison, wherein the defendant Robert Mc. Mennomy was nominated executor, although he had never proved it or taken out letters testamentary—nor did it appear he was aware of its existence until it was made an exhibit. The will bore a date shortly after the period when the money was placed in the hands of the defendant. By a general devising clause, she bequeathed to the five children before named all her estate of whatever description, share and share alike, with certain reservations and exceptions in favor of Hannah and the sons Charles and Robert; and the will directed that whatever could at the end of every year be saved from carrying on the business of selling books and of a printing office, after deducting the expences of the family, should be put out at interest, and, together with the interest arising out of her money already at interest, accumulate until the youngest survivor of her children were of age—and then followed, "should it so happen that any of my children die before my estate is to be divided as directed, their share is to go to their lawful issue; but should there be none, his or her share shall be divided between my surviving children."

The cause had been brought to a hearing and a decree was made which declared the rights of the mortgagees and whereby the complainants, upon their representations, were adjudged entitled to three fifth parts of the principal and interest monies secured by the mortgage, and the defendants Hannah Harrison and Benjamin S. Fowler and Ann Evelina his wife, in her right, to two fifths; with a reference to take an account of the amount due on the mortgage and separate accounts as between the mortgagor Robert Mc. Men-
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mony and each of the mortgagees in respect to their separate shares.
 The defendant, Mc. Menmony, being dissatisfied with the decree, applied for and obtained a rehearing, which now came on.

Mr. *H. M. Western*, for the defendant.

Mr. *T. L. Ogden*, and Mr. *W. H. Harison*, for the complainants.

THE VICE-CHANCELLOR :—This cause has been reheard; *October 6th.* and the defendants have insisted that the complainants can have no right to any share of the mortgage money and, therefore, the bill must be dismissed or if not so, still there must be other persons who have a right to a portion of the mortgage money made parties, before a proper decree can be had.

There might be no difficulty in deciding this cause, provided the court was bound to look no further than to the bond and mortgage. By these instruments, a debt was secured to the several persons therein named payable with interest at such time as the youngest of them had attained the age of twenty-one years. Thus, there were immediate vested interests in equal portions from the time the bond and mortgage were made; and although payment was postponed and in the event of the death of one or more of them, the right of action at law devolved upon the survivors, yet the respective shares were transmissible and assignable before the time of payment arrived. Upon these principles and viewing the bond and mortgage aside from other matters, there would now be all proper parties before the court to authorize an ordinary decree for foreclosure and sale.

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But a very different construction and effect are sought to be given to the bond and mortgage, by the answer of the defendant Mc. Menmony; and if the facts bear out this construction, then an end is undoubtedly put to the present bill. The hearsay testimony offered by this defendant is incompetent to alter or affect, in the smallest degree, the import of the written instruments; and the evidence of Hannah Harrison, as to the precise extent of the trust in relation to the money placed in the defendant's hands by her mother, still leaves the point in doubt. Indeed, it is apparent, throughout her testimony (and it could hardly be otherwise) that instead of clear and distinct facts resting on her mind, she has only given the vague impressions and opinions entertained by her; and she admits she has been much perplexed with the opinions of others in regard to the question whether the defendant is pursuing the intention of her mother in saying the money should be divided between the witness and Ann Evelina, the only two who were living when the latter arrived at age. Upon testimony so vague and uncertain, it is unsafe to decree a trust of the particular description set up in the answer. Parol evidence is admissible to prove a trust in opposition to an absolute deed or written instrument: but it must be evidence of so positive a character as to leave no doubt of the fact and, at the same time, so clearly define the trust as that the court may see what is requisite for its due execution. There can be no doubt a trust was created for the benefit of the children upon placing the money in the hands of the defendant: for it was not a loan of money to be repaid by him as borrower, but the same was a special deposit for the purposes of investment and accumulation—the fund not being distributable until the youngest attained the age of twenty-one years. The number of parts into which the fund was then to be divided is left uncertain by the parol evidence.

The trust restricting the distribution of the fund to the survivors is not made out; and the act of the defendant, Mc. Menmony, in executing a bond and mortgage payable in the manner already mentioned, is evidence to the contrary. In order more clearly to show the trust was not as is asserted by the defendant, the complainants have produced in evidence

the will of Margaret Harrison ; and it has been made one of the points on the part of the complainants, that even admitting the money to have been confided to him by the testatrix, with the instructions which he alleges, still her subsequent will must alter and control the disposition of it. I think this correct. The money in the hands of the defendant was still the money of the testatrix and subject to her disposition by will. It was competent for her to declare the trusts, fix the time when the distribution should be made, and designate the persons or classes of persons to take. And all this she has done by her will. The money secured by the bond and mortgage is the same which she disposes of and gives over by her will ; and although this bond and mortgage purport to secure the payment of the principal and interest to the five children absolutely as a debt owing to them, yet the security must be held to enure for the benefit of those entitled under the will. Robert having died before the time appointed for the division of the fund, his interest therein ceased and the right to his share devolved upon his children and did not go to his personal representative. So, upon the death of Charles, his interest ceased and was not transmissible to his personal representative and, leaving no issue, it merged in the shares of the survivors. Again, with respect to the interest of Mrs. Littlejohn. This vested in her child at her death and not in her husband ; and, consequently, his personal representative is not entitled to receive it.

The objection arising from the production of the will in evidence to the right of the administrators of Robert, Charles and the husband of Mrs. Littlejohn to file this bill was not taken upon the original hearing of the cause, but is now—upon the rehearing—urged : and it appears to be insurmountable. If we take the bond and mortgage in connection with the will, (and which is produced by the complainants for the purpose of controuling the disposition of the money) it will at once be seen that the present complainants can have no interest in the money and no right, in their representative capacities, to file the bill. In case any portion of the money, to arise from the sale of the mortgaged premises, should be permitted to go into their hands, they would receive it as assets to be applied in a due course of administration. The court can-

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not make a decree for a sale of the mortgaged premises and, at the same time, stop the money from going into the hands of the complainants. This would amount to an acknowledgment of their right to sue and yet be a withholding of all benefit by it.

Nor do I see how the present complainants can be regarded in the light of trustees suing for the benefit of the parties entitled under the will. The defendant, Robert Mc. Menomy, is the trustee of the fund; and the bond and mortgage may be considered a security for the performance of the trust. No doubt the persons actually entitled, as *cestuis que trust*, may come into this court and call him to an account and claim the benefit of the security. They may have rights to an account beyond what may be secured by the terms of the bond and mortgage. And hence the propriety of their being before the court as parties complainants, instead of the persons who have filed the bill.

I feel constrained to say the complainants have, by the production of the will, debarred themselves from a standing in this court.

It has been urged that this objection comes too late—that it should have been taken at an earlier stage of the suit. Not so. The defendant was at liberty to take the objection at any time after the foundation for it was laid; and, indeed, it could only openly appear upon the hearing. Besides, it is not a mere formal objection which could be obviated by an amendment, but one of substance, going against the entire right of the complainants to sue, from their having no interest in the matters in controversy.

The decree heretofore made must be reversed and the bill dismissed.

As there were *prima facie* claims of right in the persons represented by the present complainants and on account of their having prosecuted the suit in good faith, I shall leave the respective parties to bear their own costs.

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WOODRUFF v. COOK and others.

Error of judgment by a surrogate, however palpable, does not render proceedings under it void; and advantage can only be had on appeal. It cannot be passed upon in a collateral suit or action.

A mother's charge for maintaining children after a father's death is not to be construed into a debt which can allow a surrogate to sell the real estate of the latter.

Where a title is impeached, a purchaser should fully, positively and precisely aver in pleading the absence or want of notice of fraud or trust, even though it be not charged in the bill; as well as all knowledge of facts charged and from whence notice may be inferred.


If a party defendant rely upon the want of notice in another from whom he purchased, he must aver the fact in pleading.

M. W. died intestate, leaving real estate mortgaged, and also a widow and two children. The widow administered; and under a claim of her own for maintenance and the mortgage debt of her husband and through the interference of her brother, she got a surrogate's order to sell the real estate, which was bought in by her father: and he, soon after, conveyed it back to her, apparently for about double consideration. No money passed. Under a *f. fa.* against the widow individually, her right in the real estate was sold by a sheriff and bought and conveyed to C., who devised it to his wife, and died. Upon a bill filed by one of the children of M. W.: *Held*, that the deeds between the widow of M. W. and her father were fraudulent; and that as notice of fraud or trust was not averred, C's deed was void. Also, that the children were entitled to the extent of their original right; that the parties defendants, according to the times of possession, were to account for rents and profits; that the dower right of M. W.'s widow passed to C. under the sheriff's deed; and that as C's widow had paid off the mortgage which had been given by M. W., she was to be allowed it in account.

Morris Woodruff died in the year one thousand eight hundred and seven, seized of the premises now in controversy, consisting of a lot of land, with buildings thereon, situated in Brooklyn. He left a widow and also two children, namely, the complainant and Thomas M. Woodruff, who was a party defendant; and both of whom, at the time of their father's death, were infants. The eldest was about three years of age. The property descended to them as heirs at law, subject to the right of dower of their mother Susannah W. Woodruff, who was likewise nominally a party defendant to this suit. She had taken out letters of administration: and afterwards, in the month of January, one thousand eight hundred and twelve, through the agency of one Henry

Feb. 25th,
1834.

Fraudulent
sale and conveyance.
Administrator.
Notice.
Pleading.

1834.  W. Eaton, her brother, caused a petition to be presented to William Livingston, Esquire, then Surrogate of King's County, praying an order of sale of the real estate, on the ground that the personal property was insufficient to discharge the debts. Upon the petition, proceedings were had before the surrogate, which resulted in an order, made on the ninth day of March one thousand eight hundred and twelve, directing a sale by the administratrix of all the real estate. By virtue of this authority, the property in question was advertised, put up at auction and struck off to Thomas Eaton, her father; and on or about the first day of April, one thousand eight hundred and twelve, she executed a deed to him as the purchaser. It purported to be for the consideration of one thousand five hundred and fifty dollars (the price at which it was sold). This deed contained a recital of the order of the surrogate, as the authority for making the sale, with a covenant of warranty as to the title. Immediately on receiving this deed, Thomas Eaton, by another conveyance, bearing date the second day of April one thousand eight hundred and twelve, apparently for the consideration of three thousand dollars, conveyed the same property back to her absolutely in fee, with full covenants as to the title. Afterwards, in the latter part of the year one thousand eight hundred and thirteen, and in one thousand eight hundred and fourteen, a number of judgments at law were recovered against Susannah W. Woodruff in her private capacity; and upon which writs of fieri facias were issued to the sheriff of King's County. As the legal title to the property in question stood in her name, the sheriff levied upon it, and, by virtue of the executions, advertised and sold her estate, right, title and interest therein. William Cook became the purchaser, at the sum of seven hundred dollars, and paid that amount to the sheriff and received the sheriff's deed in the usual form of such conveyances bearing date the nineteenth of July, one thousand eight hundred and fifteen, duly executed. Under it, Cook entered into possession. At his death the possession devolved upon his widow Rebecca Cook, to whom he devised it for life, and who had ever since held the property under the title acquired at the sheriff's sale.

The object of the bill in this cause, was to set aside the

sale of the property effected by virtue of the proceedings before the surrogate, as being merely colourable and fraudulent in respect to the complainant and his brother; and as being irregular and insufficient, upon the face of such proceedings, to pass any title to a purchaser; and, likewise, to have the deed from the sheriff to William Cook declared void and of no effect as against the complainant, and so that the defendants Rebecca Cook and others, the representatives of William Cook, might be decreed to release to the complainant his share of the property, and they, together with Susannah W. Woodruff, might account for the rents and profits since the death of Morris Woodruff.

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Mr. O. Bushnell, for the complainant.

Mr. Bogardus, for the defendants.

THE VICE-CHANCELLOR:—As the legal title and estate were in the complainant and his brother at the death of their father, the first question is, whether they were divested of it by the proceedings before the surrogate and the sale which took place thereupon? *Oct. 6th.*

There appears to have been enough presented to the surrogate, in the first instance, to give him jurisdiction. He had before him a petition, in due form, suggesting a deficiency of assets and an account annexed containing items of personal estate and debts; and the truth or falsehood of the account was immaterial as regarded the question of jurisdiction. It is true, the account upon its face appears a very extraordinary one for the purpose of laying a foundation for such a proceeding; and it shows that the surrogate in deciding, as he did, upon the propriety of a sale, was either grossly ignorant of the intention and object of the statute and of his duty under it or entirely regardless of the rights and interests of the infants. But, in the exercise of his powers, having acquired jurisdiction, he must be considered as acting judicially; and an error of judgment, however palpable, does not render the proceedings void but voidable and advantage can only be taken of the error on an appeal and not in

1834. any collateral suit or action where the proceedings may
 ~~~~~ come in question. In *Jackson v. Robinson*, 4 Wend. 436.  
 WOODRUFF and in the still more recent case of *Jackson v. Irwin*, 10.  
 v. Wend. 441., the effect of similar proceedings before surro-  
 COOK. gates to pass the title of real estate was considered by the  
 Supreme Court and the principles which govern on this sub-  
 ject are there very clearly stated.

Although the order of sale in this case may not be deemed a nullity, yet the conduct of the parties as exemplified throughout the proceeding, and especially in relation to the sale of the property to Thomas Eaton and his immediate conveyance of it back to the widow, without any money being paid (for none was ever paid to the surrogate as his subsequent order shows, although the order of sale directed the purchase money to be brought in for distribution according to the statute) all tend to prove there was a preconcerted design, on the part of the widow and her father and brother, to change the title of the property by divesting the children of it and vesting the same in her, the better to enable her to raise money by mortgage or otherwise for their private purposes. All this is evident from the circumstances and proofs in the cause, independently of the testimony of the widow given upon her examination as a witness—but which, I think, is inadmissible as against the defendants.

As respects the children, the sale was manifestly a fraudulent one; and if the question were now between them and their mother as to whether she could hold the property as her own under the title thus acquired, there can be no doubt it would be the duty of this court to compel her to restore it to them.

Had the sale been regularly conducted under the surrogate's order and some third person had become the purchaser in good faith, the abuse of the law or fraud upon the rights of the children to which I have adverted might not be permitted to defeat the title of such purchaser. But in the present case, Thomas Eaton was not a *bona fide* purchaser. The property was struck off to him and a deed executed merely that he might convey to her. He was an instrument only. No money passed. Indeed, there appears to have been no occasion for any. According to the subsequent

proceedings and entries in the surrogate's office, the creditors were called upon by public notice to produce their demands before him and no one appeared, and he then found that all the debts of the intestate Morris Woodruff "had been settled and adjusted by the administratrix." In the account of debts exhibited at the inception of the proceeding, the chief items to show that "the aid of the surrogate in the premises was required" was one of three hundred dollars due on a mortgage to a person named Bonton; and this mortgage was not paid out of the pretended proceeds of sale, but remained a subsisting incumbrance when Cook purchased at a sheriff's sale and was afterwards paid out of the estate or by him. The other was a charge of one thousand four hundred and seventy-five dollars due to the mother herself for the maintenance of the two children, at three hundred dollars per annum, since the death of their father; and as this sum was claimed by her as a creditor, it required no money to be actually paid down upon his becoming the purchaser of the property which he was immediately to transfer to her. The conclusion is a safe one that no money was paid; and that the sums specified in the deeds were merely nominal. In the second deed, the amount is nearly double the first, as if she had allowed and paid her father an immediate profit of nearly one hundred per cent. The circumstances forbid our believing it; and it is manifest that the object of the parties was not to convert the property into money by a real sale for the payment of debts against the intestate's estate, but to change the title upon paper and, under the forms of law, to give it the semblance of an actual transfer. Even if the mother's demand against her children for maintenance was a just one, it was not a debt or claim against the estate for which the property was liable to be sold in this manner: and yet the surrogate must have proceeded upon the mistaken ground that the statute did authorize a sale for the payment of such demands as well as for the satisfaction of debts contracted by the ancestor himself.

Under these circumstances, it is impossible Mrs. Woodruff can be considered a purchaser with a valid title as against her children. Even supposing the sale to have been duly authorized and no fraud really intended, still public

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policy requires that no person standing in her situation with respect to the sale of property and the rights of others should be permitted to become a purchaser at such a sale either directly or indirectly; and upon this ground alone the conveyance to her would be avoided and she would be treated as a trustee holding the property for the benefit of her children and to the extent of their original rights. It is unnecessary to cite authorities in support of this familiar and well established doctrine; but *Davoe v. Fanning*, 2. J. C. R. 252. and *Gallatin v. Erwin*, Hopk. R. 48. and in *Error*, 8. Cow. 361. may be mentioned as prominent cases where it has been applied.

The title in Mrs. Woodruff being thus defective, the next question is: what is the operation of this defect upon the title acquired by William Cook and of those claiming under him? Their title, if supported at all, must stand upon the ground of his being a *bona fide* purchaser for a valuable consideration and without notice of the fraud or trust affecting the title previously. It is only on this ground the defence can rest where a title is thus impeached. For the purpose of enabling them successfully to make this defence, they should aver in pleading the absence or want of notice of the fraud or trust, and this, too, fully, positively and precisely—even though it be not charged in the bill. They should also deny all knowledge of facts which are charged and from whence notice may be inferred. All this is necessary in order that the facts constituting the defence may be put in issue and proved; and the rule likewise is, that if the party rely upon the want of notice in another from whom he purchased, he, still, must aver the fact in pleading: *Gallatin v. Erwin*, supra, and cases there cited. Now, the answer of the defendants does not contain the requisite averments to make out their defence. They do not appear to put themselves upon the ground that William Cook was such *bona fide* purchaser without notice: but rely upon the regularity of the proceedings before the Surrogate, with the fairness of the sale to Thomas Eaton and his conveyance to Mrs. Woodruff, and also the good faith of all those parties in the transaction as giving validity to the title in her. This, however, proves defective; and if William Cook purchased upon

the strength of it, without any thing more, he must be deemed to have taken upon himself the risk of its being set aside. On the other hand, if he bought in entire ignorance of the manner in which she acquired title and paid his money innocently and upon the faith of an absolute ownership in her—she being in possession and a deed standing in her name—without any act or circumstance coming to his knowledge to create suspicion or to induce an inquiry whether her children were not interested, then, in order to protect his purchase and enable them to hold the property upon the ground of a superior equity, the defendants should have averred in their answer particularly a want of notice and every fact necessary to raise that equity in their favor. As the case now stands, they cannot claim the benefit of the protection which the law affords to *bona fide* purchasers without notice; and even if their answer had contained such averments, still it appears to me, from the nature of the case and under the circumstances, that it would have been very difficult to support their title against the complainant.

I must decree in his favor to the extent of his original right. The property descended to him and his brother in equal moieties as tenants in common, subject to the right of dower in their mother and to the Bouton mortgage given by their late father.

The complainant is, therefore, entitled to an account of one third of the rents and profits—his mother's dower taking off one third, while his brother is entitled to the remaining third—and his share of the property is chargeable with one half of the principal sum and interest payable on the Bouton mortgage. An account of the complainant's share of the rents and profits must be taken against the executors of William Cook from the time of his purchase to the period of his death; and from that event it must be continued against his widow Rebecca Cook, to whom the whole income of the estate was devised by her husband for life and who has, since his death, been in possession. As Mrs. Cook has paid off the Bouton mortgage, she is entitled to stand in the place of the mortgagee and to have all proper allowances on this score; and the executors of William Cook are to be allowed for all monies paid by their testator in keeping down the

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interest on this mortgage during his life—one half of which is chargeable to the complainants' share of the rents—and all proper allowances must likewise be made to them for taxes and repairs of the premises, as well as other incidental expenses.

The right of dower of Mrs. Woodruff in the premises continues during her life ; and I think it is fair to say, her right passed by the sheriff's sale to William Cook. It was a sale and transfer of all her right, title and interest in the property ; and, by reason of her personal covenants in the deed to Thomas Eaton her father, I think she is estopped from setting up or claiming her dower ; while, William Cook having come into possession under a title which proceeded from her, may well be considered in equity possessed of her life interest as tenant in dower. When this ceases, the right and interest of the defendant Rebecca Cook and of her children as devisees in remainder will also end.

As to the mortgage given by Mrs. Woodruff to Phebe Lott before the sheriff's sale and while she pretended to be the sole owner of the property and which is understood to be a mortgage in fee :—no decree can now be made affecting its validity. It remains unpaid. The mortgagee is not before the court ; and *non constat* that it can be avoided or that the complainant will attempt to set it aside. Until it is impeached, the court must regard it as a good mortgage. The purchase by Cook was subject to it ; and so far as he or his representatives have paid interest, I am of opinion they must be allowed such payments out of the rents for which they are to account—charging one third to the complainant and bearing one third themselves as applicable to the dower (Mrs. Woodruff having created this incumbrance herself and embraced in it whatever interest or title she had.)

These requisites for taking the accounts must be contained in the decree ; and all further directions, with the question of costs, are reserved.

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The statute against usury does not apply where a loan is made to be returned within a certain time or upon a certain event depending upon a casualty which hazards both principal and interest without any right to look to the borrower.

Where a monied transaction is substantially a loan, upon an understanding that the money or thing is to be returned at all events, the lender cannot lawfully reserve to himself any thing in the shape of interest or profit beyond the amount of legal interest. Nor will any shift or contrivance take the case out of the statute.

The test of usury is: whether the substance of the transaction is really a loan of money or the creation of a debt, whatever may have been the form of the contract; and if it be a loan, then whether the lender or payee has stipulated for or secured to himself by means of the loan and arising either from it or from any thing connected with it and forming part of the same transaction, any profit or pecuniary advantage he would not otherwise have been entitled to exceeding the rate of interest allowed by law?

N. owed L. \$4500. The former applied on behalf of himself and D. to L. for a loan of \$80,000 to purchase a cargo, and so that the old debt of N. of \$4500 was to be secured by the same bond and in the same way whereby the \$80,000 was to be secured. In fact, a bond was given by N. and D. with a surety for \$64,500 and interest, and L. also held the return cargo (as had been agreed) for better security. *Held*, that the adding of N.'s old indebtedness of \$4500 to the \$80,000 borrowed by N. and D. did not make the matter usurious either as between N. and L. or D. and L.

#### A question of usury.

George R. Dowdall and Edward H. Nicoll, in the month *Feb. 26, 27.*  
of May, one thousand eight hundred and twenty-nine, projected a voyage to Canton on their joint account. It was to be performed by the ship *Ajax*, commanded by Dowdall. In order to effect it, Edward H. Nicoll applied to the defendant, Robert Lenox, for a loan of sixty thousand dollars, in specie. After some conversation between the latter parties, the application was reduced to writing, as follows:

"To Robert Lenox, Esquire,

"Captain George R. Dowdall, in conjunction with myself, will take from you \$80,000 to be shipped on board the *Ajax* for Canton on the following terms, viz. interest at seven per cent. per annum. The property to be insured by Dowdall and myself, and the policies made payable to you in case

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of loss and lodged in your hands, and four thousand five hundred dollars of the old debt to be secured in the same manner. The bond to be given for \$64,500 and to be of the same tenor as those of the Superior and Ajax last voyage. The bond to be dated 15th May, 1829, and to bear interest from that time. The goods to come home free of freight. Bill of lading and invoice under cover to you. \$20,000 will be required on the 18th inst. and the balance on the 20th and 22nd inst. New York, 11th May, 1829.

*Edward H. Nicoll."*

Mr. Lenox assented to these terms. The *four thousand five hundred dollars of the old debt* was part of a larger amount owing by Edward H. Nicoll individually to Mr. Lenox ever since the year one thousand eight hundred and twenty five; and at which time the former had failed in business and become insolvent: but still he had not been discharged from this indebtedness and the same remained due. Upon a condition of including this amount in the bond and having it embraced by the securities to be given for the desired loan, Mr. Lenox agreed to advance sixty thousand dollars. The money was furnished and shipped on board the Ajax, for the purposes of the voyage; and a bond was executed, by Captain Dowdall and Edward H. Nicoll jointly as principals and by Robert Smith as their surety, for the payment of sixty-four thousand and five hundred dollars with interest at seven per centum per annum—while, as a further security, the policy of insurance, bill of lading and invoice of the outward shipment, as also those appertaining to the return cargo, were placed in Mr. Lenox's hands and were under his control.


Previous to the sailing of the ship, a private agreement between Captain Dowdall and Edward H. Nicoll, specifying the terms upon which the voyage was undertaken as between themselves, was drawn up in writing and executed by them under date of the twenty-second of May one thousand eight hundred and twenty-nine. After reciting their having chartered the Ajax for the voyage and borrowed sixty-four thousand and five hundred dollars from Mr. Lenox upon their bond at seven per cent. interest from its date until paid, then the agreement provided that Captain Dowdall should proceed in the ship to Canton and for which he was to be allow-

ed two thousand dollars and ten tons privilege for his services as commander of the vessel; and the sixty-four thousand and five hundred dollars was to be invested in merchandize at Canton, free of commissions, if possible, and likewise all surplus funds on board the ship, after paying port charges; and on the arrival of the ship at New York, the return cargo should be sold with as little delay as possible, free of commissions by either party; and after paying off the bond to Mr. Lenox with the interest thereon and government duties, premiums of insurance, storage, cartage and auctioneer's expenses, then the profits arising from the adventure were to be equally divided between them, and whatever loss might accrue was also to be borne equally. Then followed this clause: "It is further agreed that of the four thousand and five hundred dollars being the premium on the aforesaid loan of sixty thousand dollars to be paid to Robert Lenox, Edward H. Nicoll is to pay two thousand seven hundred dollars and George R. Dowdall is to pay one thousand and eight hundred dollars."

It did not appear, however, that Mr. Lenox was in any way apprised of the making of this agreement nor that he ever knew of its contents. The same was a matter of private arrangement between Edward H. Nicoll and Captain Dowdall and in which they used whatever expressions they thought proper.

The ship performed her voyage; but Captain Dowdall died at Canton. The money was nevertheless invested in a return cargo, consisting of teas and cassia, and the same, upon the vessel's arrival at New York in the spring of the year one thousand eight hundred and thirty, was duly entered at the custom-house by Francis H. Nicoll, one of the complainants, as executor of Captain Dowdall and on account of the property forming part of his estate—the name of Edward H. Nicoll not appearing openly in the transaction. The cargo was then landed and, in pursuance of the original agreement, was delivered to Mr. Lenox and deposited in his store-house for the purpose of preserving his lien; while custom-house locks were placed upon it for securing the duties. Shortly afterwards Francis H. Nicoll secured portions of the duties by executing bonds, in his capacity of executor,

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with himself personally and Edward H. Nicoll as sureties, and obtained permits for the delivery of such quantities of the teas as the secured duties covered. By Mr. Lenox's consent these teas were taken out of the store; and some of them were immediately passed over to Robert Smith, who caused them to be sold. He still held the proceeds.

Subsequently and in the latter part of the month of September one thousand eight hundred and thirty an engagement was entered into between Robert Lenox, Francis H. Nicoll, as executor of Dowdall, and the house of Haggerty, Austin & Co., by which all the teas remaining in store unsold were to be placed in the hands of Haggerty, Austin & Co. to be sold at auction and out of the proceeds of the sales—after retaining their charges, commissions and a sufficient amount to cover the bonds which they might enter into for duties—they were to pay over to Robert Lenox the amount of his claim, specified as being about seventy-one thousand dollars, including interest and storage, and the residue, if any, was to go to Francis H. Nicoll, the executor. Under this arrangement Messrs. Haggerty, Austin & Co. received and sold the property at auction and out of the proceeds paid to Mr. Lenox fifty-nine thousand eight hundred and fifty-seven dollars on account.

Before any further payments were made, the complainants gave a notice forbidding any more money to be paid to Mr. Lenox; and soon afterwards exhibited their bill, which was the foundation for this cause, for an injunction to prevent any more of the proceeds from going into his hands. The injunction was granted, in the first instance, principally upon the ground that the bond being given for sixty-four thousand and five hundred dollars, upon an advance of only sixty thousand dollars was, under the circumstances, void for usury. The injunction was afterwards modified so far as to permit further payments to be made to the extent of sixty thousand dollars and interest upon that sum and charges for storage—leaving the question open with Mr. Lenox as respected the four thousand and five hundred dollars and interest upon it. The balance remaining in the hands of Haggerty, Austin & Co. was sufficient to pay the latter amount.

The question for the court was, whether, as between

Dowdall and Mr. Lenox, the bond for sixty four thousand and five hundred dollars and interest was an usurious one ? 1834.

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Mr. *W. Kent* and Mr. *D. B. Ogden*, for the complainants.

Mr. *T. L. Ogden* and Mr. *S. A. Talcott*, for the complainant Robert Lenox.

Mr. *J. P. Hall*, for the defendants Edward H. Nicoll and Robert Smith.

**THE VICE-CHANCELLOR:**—The objection of usury has been placed upon two grounds: 1st, That interest was reserved to commence on the fifteenth day of May (the date of the bond), whereas, according to the proposals for the loan, the money was not required until the eighteenth, twentieth and twenty-second days of the same month; and, 2nd: That four thousand and five hundred dollars of Nicoll's old debt was added to the sum actually lent, and was included in the bond and an interest of seven per cent. reserved upon the whole amount. *October 6th.*

I. With respect to the first point. It is not made an objection by the bill that interest was reserved by the contract to commence on a day anterior to the actual loan or advance of the money. In order to give the complainants the benefit of such an objection, they should have put it forward distinctly in their bill. If the money was not advanced and was not intended to be advanced until some time after the day appointed for the interest to commence, then the fact should have been alleged in order that the defendant might have had an opportunity of answering it and, if necessary, of putting in issue the fact of intention to take, by this means, excessive interest. It is true Mr. Lenox has, in his answer, set forth the letter containing the proposals for the loan which, with the additional circumstance of Robert Smith's becoming a co-obligor in the bond, were the terms assented to and finally agreed upon; and the answer also states that the money was accordingly advanced and paid to Edward H. Nicoll in various sums as called for by him and on different days about the time of the date of the bond and in part before and in part after such date, but on what par-

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particular days he cannot now state with certainty. Taking, then, this explanation in connection with what appears on the face of the latter—and it is only from the statements in the answer and not from any thing in the bill that the question upon this point is attempted to be raised—and I see no evidence of any unlawful agreement in respect to the time when the interest was to commence. The sum was large and the convenience of the contracting parties would seem to require that a day should be appointed for the lender to set apart the money and leave it in readiness for the borrowers, in order that the latter might know it was already appropriated and at his command. Such may well have been the object of the parties in the present instance when fixing upon the fifteenth of May for the date of the bond and the commencement of interest upon the loan, although the course of the business did not require the actual delivery of the money to the borrower until some days afterwards. The money might be considered as appropriated to the objects of the loan as effectually as if it had been handed over. In the absence of all evidence and even allegation to the contrary, I am bound to believe Mr. Lenox provided the money on the fifteenth, and from that time forward had it on hand unemployed and set apart for the intended purpose. And in such a case I am of opinion he was entitled to interest from that date. If the fact is not so, the contrary should have been alleged and proved. The expression in the letter that twenty thousand dollars would be required on the eighteenth and the balance on the twentieth and twenty-second is no evidence that the money was not in readiness and to all intents and purposes so set apart as constituting a loan on the fifteenth of May. The term “required,” meaning *demanded—needed*, may have had reference only to the delivery or handing over of the money. For these reasons, I think the first objection not sustainable.

II. I come now to the consideration of the second and more formidable question. Usury consists in stipulating for or in receiving, upon a loan of money or for the forbearance of a debt, a greater rate of interest than is allowed by law. There may be cases where more than the legal rate of interest is reserved and still not be within the statute: as

when a loan is made to be returned within a certain time or upon a certain event but depending upon a casualty which hazards both principal and interest and gives no right to look to the borrower. But where the interest only is hazarded in this way and the borrower remains liable to restore the principal, then it is usury. Hence it has become a general rule by which courts of law and equity are governed in giving effect to the statute—subject to some exceptions which I shall presently notice—that where the transaction is substantially a loan upon an understanding that the money or thing lent is to be returned at all events, the lender cannot lawfully reserve or take to himself any thing in the shape of interest or profit beyond the amount of interest at the legal rate; and no shift or contrivance for this purpose will be allowed to take the case out of the statute.

The exceptions to the rule embrace special and peculiar cases, as where, under some circumstances, the lender can charge commissions for transacting business: *Nourse v. Prime*, 7. J. C. R. 69.; or where a mortgagee out of possession stipulates for the consignment of the produce of the estate mortgaged to be sold by him on commission: *Bunbury v. Winter*, 1 J. & W. 255; *Sayers v. Whitfield*, 1. Knapp's R. 133.

Some of the most frequent instances of what are deemed shifts or contrivances to elude the statute are, where the loan is made in a depreciated currency or in bonds, notes or goods of a less value than their nominal amount, as in *The Bank of the United States v. Owens*, 2. Peter's Reports, 527;—or, where, in connection with the loan of money and as part of the same transaction, the lender sells to the borrower, while in embarrassed circumstances, lands, goods or other things at a price exceeding their real value and includes the amount in the security for the loan: *Eagleson v. Shotwell*, 1. J. C. R. 538; *Morgan v. Schermerhorn*, 1. Paige's C. R. 544;—or where the advance of money, although exhibiting all the characteristics of a loan, is made to assume the form of a purchase of a rent charge or an annuity payable out of lands and exceeding lawful interest upon the sum advanced: *Lloyd v. Scott*, 4. Peter's R. 205. And so, likewise, where the borrowing of money is accom-

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panied by the grant of a lease by the borrower to the lender, the latter taking advantage of the necessities of the former to obtain a lease at a rent less than the fair yearly value of the lands or upon more advantageous terms than he otherwise could have done at the same time reserving to himself full interest upon the money lent.

There is a numerous class of cases of this description which have arisen in the courts and especially in the Irish chancery in the time of Lord Redesdale and Lord Ch: Manners; but the doctrine of which has been reviewed and in some degree modified by the late Lord Ch: Hart in *Moore v. M'Kay*, 1. Beatty's Rep. 282., (reported likewise, but not so fully upon this point, in 2. Molloy's Rep. 134.) In all the cases to which I have adverted and in others that might be mentioned, the question seems to have been whether the substance of the transaction was really a loan of money or the creation of a debt, whatever might be the form of the contract; and if found to be so, then whether the lender or payee had stipulated for or secured to himself, by means of the loan and arising either from it or from any thing connected with it and forming a part of the same transaction, any profit or pecuniary advantage he would not otherwise have been entitled to exceeding the rate of interest allowed by law. That this is the test, appears likewise from the language of Judge Johnson in *Bank of the United States v. Owens*, 2. Peters, 537. He says, "a profit made or loss imposed on the necessities of the borrower, whatever form, shape or disguise it may assume, where the treaty is for a loan and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan and to be a violation of those laws which limit the lender to a specified rate of interest."

It then remains to be seen whether the case in hand is one coming within this principle. Here was a loan of sixty thousand dollars, to be repaid at all events, with the lawful rate of interest. This is admitted. At the same time one of the borrowers was justly indebted to the lender upon former dealings in a large sum of money—this is not attempted to be impeached.


The existence of such indebtedness would of itself form

a valid consideration for the giving of a bond with surety for the payment and with interest for the forbearance. Such security the creditor might lawfully ask and receive at any time, even though his debtor happened to be insolvent or in embarrassed circumstances. When, therefore, Edward H. Nicoll applied for the loan in order to enable him to undertake a mercantile adventure from which a profitable result could confidently be expected, it was not unreasonable and certainly not improper for Mr. Lenox to make it a condition upon which he would lend him the money that he should include in the security for the repayment a portion of the existing debt. In *Ex parte Burton*, 1. Atk. 255., Lord Hardwicke held a bond given under somewhat similar circumstances to be valid and founded upon a good consideration. It is true that in addition to the return of the money lent with interest, the lender obtains by this means a benefit or advantage which he did not before possess, namely, a security for the payment of an old debt with its accruing interest. But this is no more than he is fairly entitled to receive; and when the full amount of the bond happened to be paid, the obligee would not have made a profit beyond lawful interest: for, after all, he has only realized the payment of his debt and the money advanced with such interest for the forbearance and use of his money as the law allows him to charge. How then can it be said that the law has been violated as between lender and borrower or debtor and creditor?

It has been, not inaptly, put in argument:—suppose, instead of one bond for sixty-four thousand and five hundred dollars there had been two bonds given upon effecting the loan, one by Dowdall for thirty thousand dollars with Nicoll as surety and the other by Nicoll as principal and Dowdall as his surety for thirty four thousand and five hundred dollars—could there be a doubt of the obligee's right to enforce the payment of both bonds? and with respect to the latter, would the fact of its covering an antecedent debt, even under the circumstances, furnish any grounds for impeaching it as usurious? This proposition seems me to admit of but one answer: that it would not. If the prior debt had grown out of usurious loans or was founded upon any illegal con-

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sideration, being then brought in and made to form a part of the consideration of a new security, the whole would be contaminated with illegality : *Harrison v. Hammel*, 5. Taunt. 780. But in the absence of even an allegation to impeach the validity of the previous indebtedness and considering it a demand which Mr. Nicoll was legally bound to pay and willing to secure, no such consequence can possibly follow.

I am satisfied, as the matter stands between Robert Lenox and Edward H. Nicoll, that there is no ground for imputing usury to the transaction.

But it is said : that so far as Dowdall was concerned, the case has a different aspect ; and it is contended that towards him the terms of the loan were oppressive—that the four thousand and five hundred dollars was a premium—that whether it be considered a premium or an old debt of Nicoll's, still, advantage was taken of Dowdall's necessities to draw him in to assume it ; and in either point of view the contract must be deemed usurious with respect to him. From what I have already observed it seems to me impossible to draw this conclusion, provided Captain Dowdall came into the arrangement and signed the bond knowing the additional sum to be an antecedent debt of Nicoll's : for, then he must be viewed as a surety voluntarily binding himself for the debt of another and, like any ordinary surety, not entitled to set up objections affecting the consideration of the instrument and which even the principal debtor would not be at liberty to urge.

There is no positive evidence of Dowdall's knowing or being aware of the fact that the four thousand five hundred dollars included in the bond was for money already owing by Nicoll. But the inference is and I think the court is bound to presume that he was acquainted with the fact. The written application for the loan expressed it ; and although it was drawn up and signed by Nicoll alone, the proposition equally concerned Dowdall and was made as if proceeding from both of them ; and as the terms proposed were accepted and Dowdall subsequently united with Nicoll in carrying the agreement into effect and corresponding in form with the proposal, I think it must be presumed, in the absence of any evidence to the contrary, that he understood


at the time the terms and conditions upon which it was made. It is hardly to be believed that Mr. Nicoll resorted to artifice and induced Dowdall to suppose it was a premium they were to pay to Mr. Lenox and not a debt of his own. And if Dowdall was thus deceived, it was done by his partner in the transaction and who, for the purposes of the negotiation, must be considered as his agent; and the remedy, if any, should be pursued against him and not be conducted in such a way as to ask for relief where the party claiming the benefit of the obligation has been guilty of no fraud or concealment.

Nor is there any thing in the circumstance that the borrowers in their private agreement treated the four thousand and five hundred dollars as a premium for the loan, (agreed to be borne by them in certain proportions) which can affect the rights of Mr. Lenox. If it were a pre-existing debt, they could not change it into a premium by calling it so. It remained the same notwithstanding any appellation they might choose to bestow for their own convenience or views. There is no pretence of Mr. Lenox's ever having assented to any change in its character or name.

Viewing the bond in the way I am compelled to believe it was understood and intended by Dowdall, as well as by the other parties to it, as a security for the loan and for the antecedent debt of Nicoll combined and not a covering of a premium, and considering Dowdall a borrower as well as Nicoll—then, according to my judgment, the transaction cannot be construed into usury or an evasion of the statute as between Lenox and Dowdall any more than between the former and Nicoll. It is true that in addition to Dowdall's responsibility for the sum actually lent with interest, Mr. Lenox had him bound for the four thousand and five hundred dollars: but this was money justly owing and Dowdall assumed it as surety in the same manner that Robert Smith became surety for both Dowdall and Nicoll in the same bond. It, therefore, comes back to the old question as regards Nicoll; and after due reflection, I cannot say there is any principle or rule of law which would go to exonerate Dowdall on the ground of illegality in the transaction which would not, at the same time, go to exonerate Nicoll.

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It has been suggested that there is something apparent in the transaction itself which was oppressive towards Dowdall and that advantage was taken of his necessities to induce him to execute the bond as a surety for Nicoll's debt; and that it was even carried so far, as between him and Nicoll, that he consented to bear as his own two fifths or eighteen hundred dollars of the amount. If Lenox and Nicoll had combined to induce this consent, by means of the loan and as one of the conditions upon which the money was to be advanced without any consideration moving from Nicoll for that part of their agreement, then, indeed, there might be a sufficient ground for adjudging the contract as void: because Dowdall would have been made to assume the payment of so much money, not as a surety for Nicoll but on his own account, in addition to the money lent. But, with that arrangement and agreement between Dowdall and Nicoll, Mr. Lenox had no concern. As to him Captain Dowdall stood in the light of a surety, with a right to look to his principal for remuneration in case he should be compelled to pay the debt. If he chose to relinquish the right, it was not by the procurement of Mr. Lenox. The question of a good consideration for such relinquishment is a matter exclusively between them. If in this respect it was a *nudum pactum* between Dowdall and Nicoll, then the latter will still be liable to reimburse the complainants this amount of money after it shall have been paid. But with respect to any oppressive means or undue advantage on the part of Mr. Lenox to draw Dowdall in to give the bond and which might form a ground for equitable relief independently of the existence of usury, the bill contains no charges of the kind and there are no circumstances in the case to warrant the interference of the court on this ground.


There is no evidence showing that Dowdall was in such a state of distress or embarrassment as would probably induce a man to agree to hard and oppressive terms of a proffered loan in order to relieve his wants. His condition was not that of a debtor pressed by his creditors and his property about to be sacrificed by forced sales or his person imprisoned and whose anxiety or eagerness to obtain the means of relief would, in some measure, deprive him of the faculty of

acting and judging with the coolness and deliberation which belongs to a free agent. His incentive was of another kind; not one arising from distress and pecuniary embarrassment, but from a desire to engage in a profitable enterprize with the confident hope of large gains. There was time for calculation and reflection; and if he found the terms of a loan and the responsibilities he must assume to obtain it greater than his anticipated profits would warrant, he had only to reject the terms and abandon the undertaking. A person in this situation taking up a loan for such purposes and upon terms which may appear to be exorbitant yet founded upon calculation and the free exercise of his own judgment, however the statute against usury may be violated, cannot be said to be imposed upon by the lender or to have had an advantage taken of his necessities. It is not the case of distress on one side which the law can notice and of undue influence and oppression on the other: *Ramsbottom v. Parker*, 6. Mad. C. R. 5.; and in this respect I think it is clearly distinguishable from *Browne v. O'Dea*, 1. Sch. & Lef. 115.; *Drew v. Power*, lb. 182.; and *Molloy v. Irvin*, lb. 310.; and others of this class which are reviewed in *Moore v. M'Kay*, where the able judge who then presided in the Chancery of Ireland concludes by saying "that he considered himself as duly applying the protective policy of the court and as acting in consistency with all preceding judgments, when he decides that to induce the interference of the court, there must be some evidence or legal presumption of the loan being used as a means of restraint or undue influence to obtain an unjust profit."

I consider this a sound conclusion and which may be applied to the present case. And as there is no such evidence before me and as I consider there can be no such legal presumption from the nature of this particular case, there is no ground for relieving the complainant's testator from the portion of the bond.

This disposes of the objections which go to the avoidance of the bond. Still, supposing it valid, there is then another point insisted upon by the complainants as a ground for partial relief against the defendant Lenox—and it is this: that he should be left to look to Edward H. Nicoll and Robert

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Smith for the proceeds of the teas which were taken out of the store and delivered to them, and that the amount should be credited on the bond or set off against the balance due. There is no foundation for this claim. Mr. Lenox had the whole cargo in his possession and under his control for the security of his debt; but being more than sufficient to pay him he was willing to part with a portion of the property. The complainant, Francis H. Nicoll, in his capacity of executor, accordingly secured the duties on a part and by a power of attorney authorized his name to be used in that way. Custom-house permits were obtained by his means; and by virtue of such permits and under his authority a portion of the goods were delivered from the store and passed into the hands of the persons named. It was immaterial to Mr. Lenox who received the property; and under the circumstances disclosed by the pleadings and according to the proofs in the cause he cannot be made liable to account for it. Besides, I think it is very clear that the agreement between the parties and Haggerty, Austin & Co. removes all difficulty on this point. It recognizes Mr. Lenox's right to be paid in full out of the proceeds of the remainder of the goods put into their hands for sale; and it was entered into after a full knowledge of all the facts in relation to the goods which had gone into the hands of Edward H. Nicoll and Robert Smith. The testimony of Mr. Haggerty has also an important bearing upon this point.

The bill must be dismissed as to the defendant Robert Lenox: but being exhibited by executors and not without some reason furnished by the appearance of the transaction with their testator, the defendant must bear his own costs. The bill must likewise be dismissed as against Messrs. Haggerty, Austin & Co., but with costs to be paid by the complainants or out of any funds belonging to them in the hands of these defendants. As they are mere stake-holders, they are, at all events, entitled to their costs.

With respect to the other two defendants Edward H. Nicoll and Robert Smith: it has been submitted whether the bill should be retained against them for the purpose of adjusting the accounts between them and the complainants as

executors? although the bill does not appear to have been framed for this purpose, yet the specific relief prayed for embraces the subject of the teas in the hands of Robert Smith; and as the general prayer for such and further relief as the nature of the case may require is in the conjunctive, any thing in addition to the specific relief which is prayed for and not inconsistent with it and which the case made by the bill will warrant, may be decreed, I am inclined to think that the adjustment of Robert Smith's accounts are within the scope of the bill. Edward H. Nicoll appears to be a necessary party to the taking of such accounts. I shall retain the bill for this purpose; and order a reference accordingly—reserving the question of costs between these parties and all further directions.

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WILLIS and others v. CORLIES and others.

The court does not appoint a receiver over real estate before the hearing, unless there is evidence of fraud in obtaining possession or special circumstances to show a necessity to preserve the property *pendente lite*.

The society of friends hold real estate (Meeting-house, &c.) by trustees, never having been incorporated. A schism takes place in the congregation; two parties are formed; and as many trustees belong to one party as to another. One side withdraws, and, claiming to hold the original faith of the society, file a bill for a receiver and to restrain the parties in possession, &c. No charge is made of danger, fraud or irresponsibility. Motion for a receiver, upon the matter of the bill and affidavits in opposition, denied with costs.

Motion for a receiver of real estate, upon the matter of the bill before answer, but which was met by affidavits on the part of the defendants.

January,  
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Receiver.

The subject matter of controversy in this cause was the real estate belonging to the society of friends in the city of New-York; consisting of two meetinghouses, a schoolhouse and other buildings and a cemetery or burying ground. The difficulty had grown out of the dissention which occurred in the society between the parties, usually denominated, by way of distinction, "*Orthodox*" and "*Hicksite*." It had led to a separation in several of their meetings within the Uni-



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ted States ; and in the month of May one thousand eight hundred and twenty eight a separation, from this cause, took place in the New York yearly meeting, and which was shortly afterwards followed by separation in the subordinate quarterly and monthly meetings.

The society of friends, unlike most other religious societies possessing property, had never been incorporated by law ; and the property in question was not, therefore, held by a body corporate, but by individuals as trustees and in whose names the legal title was vested. The trusts upon which they held appeared to be substantially these, namely, to permit the meeting houses to be used for public or private worship under the direction of the monthly meeting, so called ; allow persons appointed by the monthly meeting to enter upon the real estate ; to alter or erect buildings, rent them, and receive the rents for the use of the monthly meeting, and if the monthly meeting should at any time nominate other trustees in the place of those holding the title, then to convey the property to such new trustees, and if any one or more of the trustees should be declared by the monthly meeting to be out of unity or church fellowship, he or they should be thenceforth disabled from serving and thereupon should release or convey all his or their legal estate in the property in such manner as the monthly meeting should direct or require.

It is to be remarked that the monthly meeting here spoken of is one of the subordinate judicatories of the society in its form of church government and, as such, entitled to the equitable and beneficial ownership of all the property or temporalities of the society situated within its bounds or jurisdiction. The monthly meetings in New York, having this ownership and control over the property, had been in the habit, from time to time, of appointing a property committee to take charge of its rights and interests in the real estate, manage the same and receive the rents and profits.

When the secession took place in the year one thousand eight hundred and twenty eight, there were six trustees and a property committee ; and of the trustees, there were three of each party. The portion of the society called "Hicksites"—and which was by far the largest part—remained in possession of all the property ; and had since had the exclu-

give use and possession of the real estate aforesaid, except the cemetery, which had been used in common as occasion required and without impediment or interruption from either.

Ever since this controversy in one thousand eight hundred and twenty eight, each party had gone on separately in the observance of all the rules of the society of friends, in regard to discipline, the mode of worship, the manner of church government ; at the regular stated periods, they had separately held yearly and subordinate quarterly, monthly and preparative meetings ; and, inasmuch as there could be but one monthly meeting and so far as regarded the beneficial interest, both parties claimed to be the regularly constituted and only true monthly meeting and entitled to the use and enjoyment of the property.


The Hicksite party, being left in the actual possession of the property, had, since one thousand eight hundred and twenty eight, made some change of trustees as well as of the property committee ; and the parties against whom the bill was filed were the persons who acted in these capacities under the authority and by the appointment of the Hicksite monthly meeting. The complainants were two of the persons who had been trustees at the time of the secession and who were of the "Orthodox" party and who also constituted the property committee since appointed by the monthly meeting of that party. They filed the bill on behalf of themselves and the other members of such monthly meeting. The object of it was to establish their right as such trustees ; and they prayed that the court would decree them to be the monthly meeting of friends as it existed prior to the separation and that the regular members thereof for the time being in their social and collective meeting capacity, might be deemed and decreed to be the true and lawful *cestuis que trust* and for whose benefit the real estate before mentioned was held ; also, that the defendants might be restrained from intermeddling in the concerns thereof until they should submit themselves to the settled order and discipline of the meeting and be restored to their rights as members ; as well as for an account of the rents and profits against the defendants and that those of them who were trustees might be decreed to convey, &c. ; and

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for a receiver in the meantime to take charge of the estate and receive the rents and preserve the property until an adjustment and decision could be had.

Mr. *H. Ketchum* and Mr. *G. Wood* for the complainants.

Mr. *C. C. King*, Mr. *D. Lord* and Mr. *Storrs* for the defendants.

January 5th.  
 1835.

**THE VICE CHANCELLOR:**—This motion has given rise to an elaborate discussion of questions which the cause is calculated to present when it shall be brought to a hearing upon the merits; but upon which I do not deem it necessary to express any opinion in this stage of the suit: for this motion can very properly be disposed of without going into a particular examination of the grounds of the bill or the statements made in opposition.

It is only necessary to observe at present that the complainants state and insist that the monthly meeting of which they are members and the quarterly meeting to which they are subordinate and the yearly meeting which they recognize and to which they adhere, are the legitimate meetings composing the true society of friends, and they charge that the defendants and those with whom they are in unity are seceders who have separated themselves from the society and departed, as they believe, from some of its ancient doctrines. And, with respect to the separation and its attending circumstances during the sitting of the yearly meeting in the month of May one thousand eight hundred and twenty eight, the explanation and statement of the defendants, by way of rebutting the allegations in the bill, go to show that the separation was premeditated and voluntary on the side of the complainants and contrary to the usages and order of the society; and they deny that the yearly meeting withdrew or removed its sittings from the house in which it had commenced and on the contrary say that the "orthodox" party having seceded, the yearly meeting there convened regularly proceeded in its business, appointed its clerk and finally adjourned to meet again at the usual time and place the next year and that it had ever since continued, from year to year, to hold its sit-

tings at the stated time and place according to the established usage and practice of the society; also that in like manner after the withdrawal of the orthodox party from the subordinate quarterly and monthly meetings, those meetings had been regularly held and continued; and the defendants, therefore, denied that the monthly meeting of New York had been excluded from the meeting houses since the secession or that the defendants, as trustees, disclaimed to hold the real estate for the use of the monthly meeting or had denied the right of such meeting to receive the rents and profits or possession and enjoyment of the property. And they further said, that the annual net income of rents had not exceeded three hundred dollars, and which had been applied towards supporting the schools maintained by the monthly meeting to which they belong.

The religious belief and fundamental doctrines of the society, as understood by the complainants, are set forth in the bill; and the defendants, by way of answer to the charge of entertaining false views and doctrines, as inculcated by Elias Hicks, of whom they are alleged to have been the followers and adherents, also give a summary of their belief and the doctrines held by the members of the meetings to which they belong—and, upon comparison, it will be found they do not differ in any important particular. Although their creeds may be somewhat differently expressed, yet they are substantially and virtually the same. And, on this subject, whatever dissensions may heretofore have been produced by a difference of opinion, there would really appear to be no room at this day for dissertation or controversy.

I am bound to believe that the solemn declarations made by the parties of their religious belief are made in all sincerity and truth; and I had hoped, after this public and reciprocal avowal of their sentiments on a subject of such great concern and in which they are found so nearly to agree as scarcely to leave a shadow of difference perceptible that, laying aside all party distinction and acting in a spirit of forgiveness and charity towards each other, they would, after a season, have come together in christian fellowship and formed again a united society—or if that were a thing not to be

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accomplished, that they would at least have adjusted their differences in respect to the property, without further litigation. Indulging in this hope, I have forborne a decision of the motion for an unusual length of time; and I could still wish—and if my recommendation can be of any avail, I would most earnestly recommend—an amicable settlement by compromise of this—I had almost said, unnatural controversy respecting property, upon such equitable and just principles as I am sure can be suggested by many sensible and good men to be found among both parties. It is, however, the business of the court to do more than offer its recommendation: when called upon, it must decide; and I, therefore, proceed to dispose of the present motion.

It cannot but be perceived that the great question in reference to the property is: which is the true monthly meeting?

For the present purpose, I assume there cannot be two monthly meetings within the same bounds or jurisdiction and both be entitled to the same property. The trusts upon which the estate is held, recognize but one and admit of no partition or apportionment of the property among several, unless by mutual consent. Where two such meetings are formed, one of them must be spurious. Here, however, there are two, each claiming to be the true monthly meeting and denying the legitimacy of the other. Both parties assert their claims and make these denials with equal confidence; and the question of right between them remains to be determined. The cause is not yet in a situation to enable the court to ascertain and decide which set of trustees is to hold the title or which committee shall have the right to manage and control the use of the property.

The defendants, as trustees and as such committee, have the present possession and assume the exercise of rights in those capacities. Believing themselves to be the rightful trustees and managers, they take care to preserve the property as their own; and there is neither proof nor allegation before me of the danger to it from acts of waste or destruction by the defendants or any apprehension of injury in consequence of the property being in their possession or under

their control pending the litigation. Nor is it alleged that the defendants are irresponsible men and unable to make good the loss of rents to the complainants, if they, the defendants, should be decreed to account for the rents which they may, in the meantime, receive. Under circumstances like these, it appears unnecessary to appoint a receiver, nor would such appointment be consistent with the principles by which this court is governed. Chancellor Kent has remarked that the exercise of the power of appointing a receiver must depend upon sound discretion and in a case in which it must appear to be fit and reasonable that some indifferent person should take charge of the property for the greater safety of all the parties concerned: *Verplanck v. Caines*, 1. J. C. R. 58. The court looks to the security and preservation of the property and ought not to interfere pending the litigation when the plaintiffs' right is not perfectly clear and the property itself or the income arising from it is not shown to be in danger. This was considered by Chancellor Sanford to be the true principle which should govern the court in the exercise of its discretion upon these motions: *Orphan Asylum v. M'Cartee*, 1. Hopk. Rep. 429. ; and it is acknowledged to be the rule in several of the English cases that there must be some evil actually existing or some evidence of danger to the property or a strong special case of fraud in the defendant clearly proved to induce the court, in this stage of the cause, to take the property under its care: *Hugonin v. Basely*, 13. Ves. 105. ; *Middleton v. Dodswell*, Ib. 266. ; *Lloyd v. Passingham*, 16. Ib. 69. In another case, in the Irish chancery, it has been observed, that such an interference is, to a certain extent, giving relief—in fact, depriving defendants of a present use and enjoyment of the estate and, so far, a decision *pro tempore* against them ; and, therefore, without some strong necessity, the court ought not to do any act to disturb the existing possession until, from a view of the whole case and by a regular adjudication, it can pass upon the right: *Houlditch v. Lord Donegall*, 1. Beatty's Rep. 402.


It has been urged in argument upon the present motion that this is a case in which a difficulty has occurred among trustees who were vested with the legal title and that a por-

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tion of them are excluded by their co-trustees—and this is such an abuse as to require the immediate interference of the court in respect to the safety of the property; and that the defendants, who were trustees, should have applied to this court for directions or by bill of interpleader, instead of assuming to act for themselves in making conveyances of the property to others and which they could not lawfully do. Whether this be so or not depends altogether upon the main question, namely, which is the monthly meeting entitled to stand as *cestuis que trust* of the property? And if the one which the defendants represent is entitled, it had the power, according to the trust, of declaring such of the trustees as were not in unity with it incompetent to serve and of appointing others in their place; while a refusal on the part of such disqualified trustees to convey to others so appointed would, of itself, have been a breach of trust. Hence, to say there has been an improper exclusion and an abuse of the trust in this respect on the part of the defendants, acting under the authority of a monthly meeting, is to determine the question.

After all, it comes back to the only inquiry which I apprehend can be made in this stage of the cause: is there danger to the property—in other words, is there evidence of fraud in obtaining the possession or any special circumstances to render it necessary for the preservation of the property *pendente lite* or proper in the exercise of a sound discretion for the interference of the court in this summary manner?

As there is scarcely a color or pretence for this application on any of the above grounds, I must refuse it with costs.

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HONE and others v. WOOLSEY *et al.*

On a judgment creditor's bill, this court will not go into the validity of the judgment. The court of law wherein it was obtained is the proper tribunal to uphold or set it aside. Debtors made an assignment to trustees for creditors, which contained a clause constructively fraudulent. The trustees reassigned all the property to the assignors, who then made another assignment to the same trustees, which was unobjectionable on its face. A judgment creditor filed a bill some days after this second assignment was executed. The court sustained the latter assignment.

On the third day of July one thousand eight hundred and February 4.
thirty two, the defendants William C. Woolsey, Benjamin 1834.
Poor and Erastus D. Converse made an assignment for the *Debtor and*
benefit of creditors and wherein the other defendants, Cort- *Creditor.*
landt Palmer, Jonathan Trotter and Richard Bartlett, were *Judgment.*
the trustees. *Substituted*
assignment.

Sometime in the month of November one thousand eight hundred and thirty two the parties who had made the assignment were advised that the validity of a similar assignment had been lately impeached in this court (*Wakeman v. Grover*, 4. Paige's C. R. 23, and in Error 11. Wend. 187); and, therefore, and on the ninth day of the same November and under the advice of counsel the assignees, Palmer, Trotter and Bartlett reassigned the property vested in them to the debtors Woolsey, Poor and Converse; who, on the next day made a new assignment to the same persons as trustees. This last assignment was good on its face; whereas the former had contained trusts which would have been considered fraudulent against creditors.

The complainants were judgment creditors of Woolsey, Poor and Converse; and had issued an execution, which was returned unsatisfied. Their judgment had been obtained upon a confession signed by Benjamin Poor alone in an action commenced by original writ. They filed their bill in this court on the fourth day of December one thousand

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eight hundred and thirty two (twenty three days after the second assignment had been executed) for the purpose of discovering property and alleging fraud in whatever assignments had been made—claiming a discovery and copies of all such assignments.

The question for the court was upon the effect of the new assignment; and the defendants were desirous of raising a point upon the validity of the judgment.

Mr. *J. Anthon* for the complainants.

Mr. *W. S. Johnson* for the defendants.

October 6. THE VICE-CHANCELLOR:—It is not necessary I should examine the objections raised against the validity of the complainants' judgment. They more properly belong to the court of law, where any irregularity in the manner of obtaining the judgment or any fraudulent and collusive means resorted to for the purpose can be examined; and if found to exist, the judgment will be set aside. The court rendering the judgment is best able to determine what is irregular and how far its process has been abused; and if a defendant wishes to avoid the effect of a judgment improperly rendered against him, the application should be made to the court of law—as was done in the case of *Grazebrook v. M'Credie*, 9. Wend. 437. If he does not take this course, but suffers the judgment to stand and at the same it appears by the record to be a judgment against the party who is brought into this court, I am inclined to think it is not the business of this court to enquire beyond the record into the means by which it was obtained.

Taking the judgment upon which the bill in this cause was founded to be a regular and valid one in every respect, and there seems to be no ground for sustaining the present bill.

The object of it is to reach property in the hands of the assignees as property still belonging to the judgment debtors. Their first assignment, made on the third day of July one thousand eight hundred and thirty two, was, as to creditors and, according to recent decisions, constructively frau-

dulent upon its face. Apprehending it would be attacked, in consequence of the chancellor's decision in the case of *Wakeman v. Grover and Gunn*, the assignees released and reconveyed to the assignors all the property embraced in the assignment, to the end that a fresh one might be made, which should replace the property in the hands of the same assignees, free from the objectionable conditions contained in the former. These transactions appear to have taken place on the ninth and tenth days of November one thousand eight hundred and thirty two; and the complainants' bill was not filed until the fourth day of December following.

Notwithstanding the latter assignment is absolute in its terms and made in trust for the benefit of creditors and, therefore, founded upon an apparently sufficient consideration, still, it is insisted, that the same is ineffectual to pass a valid title to the assignees; and also, that inasmuch as the first assignment was voidable at the instance of creditors, none but a voidable transfer could be made to the assignors and, of course, no better title could be conveyed by them to assignees and, consequently, the last assignment was subject to the same objection which might have been taken to the first and equally liable to be set aside.

The distinction between void and voidable must be attended to in considering this question. A deed or instrument utterly void is as one which never existed. It passes nothing—confers no right or title upon the party named as a grantee—and is of no effect as between the immediate parties to it; but an instrument or deed fraudulent as to creditors and purchasers and voidable by them, is nevertheless valid as between the parties to it, and the title is deemed to have passed and vested in the grantee or assignee—liable, indeed, to be divested at the suit of a party aggrieved. However, until suit brought for the purpose, such fraudulent grantee may sell and convey and a *bona fide* purchaser from him, without notice of the previous fraud, will acquire a good title against all the world: *Anderson v. Roberts*, 18. J. R. 515.; *Bean v. Smith*, 2. Mason, 252. Again:—a void deed is incapable of confirmation or of being made good by any subsequent act of the party; while one which is merely voidable may be made good by matter *ex post facto*.

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1834. It may be confirmed; and will then be effectual for all purposes, unless the rights of third persons intervene and prevent it. Nothing, I consider, is more clearly settled than that an assignment constructively fraudulent under the statute or at common law in regard to creditors is voidable only and not absolutely void. I had occasion to examine this doctrine in the recent case of *Henriques v. Hone*, ante, p. 120.; and the principles there stated, adduced from former decisions, I must adhere to, until I shall be better instructed by the final decision to be had on the appeal in that cause.

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In the case I am now considering, the first assignment, of the third day of July one thousand eight hundred and thirty two, was not a nullity. It was voidable only as between the assignors and assignees—the title passed and a trust was created for creditors upon the trusts and conditions contained in it. None of the creditors came forward to accept the property upon those terms; and it appears to me that before the rights of any of the creditors had actually attached as *cestuis que trust* under the assignment and before any of them were in a situation to acquire liens by virtue of judgments and executions returned and the filing of bills, the parties were at liberty to do any further acts by which the assigned property might be held by the assignees upon similar trusts, but divested of the objectionable features of the first instrument. If the first assignment were capable of confirmation, then no matter in what form it may have been done, whether by a conveyance back to the assignors and a reassignment by them or by an instrument reiterating the trusts and dispensing with the conditions upon which they were to take effect. This court will look to the object and intent of the parties and give effect to their acts so as to carry such intention into effect wherever it is fair and honest.

The principles decided in *Murray v. Riggs*, on appeal, 15. J. R. 194. and *Mackie v. Cairns*, on appeal, 5. Cow. 547., in relation to acts done in confirmation of the deeds of assignment, support the views I entertain upon this part of the case.

One of the points made in argument on the part of the complainants that no act done by the assignees to revest the title in the assignors could be available against the creditors,

because the fraudulent assignee had no title as against creditors and, therefore, as against them, could convey nothing, is confounding the distinction between void and voidable deeds. In the latter cases, the assignees or grantees certainly have a title as against creditors in the first instance until the creditors can take measures to impeach and avoid the fraudulent instrument. Under a fraudulent assignment, and from the time it is made, no trust results for creditors at large; and in this consists the fallacy of such an argument.

For these reasons, I am of opinion the reassignment of the tenth day of November one thousand eight hundred and thirty two, under which the assignees held the property, must be deemed a valid assignment; and as it embraces the residuary interest or surplus which the assignees had, under each of the partial assignments they had previously made for special purposes to other persons and no other property of any kind is discovered as belonging to the debtors, there is no alimant for the present bill against any of the defendants. It must be dismissed with costs.

BULLOCK v. BOYD *et al.*

A stated account which is to be considered as valid between the original parties to it, is also so between one of the parties and a person who guarantees under it.

A defendant may plead or set up in his answer a stated account to a bill for an account generally; and this will be, *prima facie*, a bar to any further accounting: unless upon a bill charging error or fraud.

A party can surcharge and falsify; but to be allowed this he must charge or show specific error.

If a bill be brought to impeach a stated account and it charges that the complainant has no counterpart of the account and prays the same may be set forth, the defendant will be obliged to do so or annex it to his answer or plea, even though he sets up or pleads a stated account.

Exception had been taken to a master's report allowing an exception to an answer for insufficiency.

The object of the bill, so far as there is any present occa-

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sion to refer to it, was to ascertain the amount of one William Lampson's indebtedness to the defendants on the tenth day of November one thousand eight hundred and twenty seven, when the complainant assumed the debt and entered into a covenant to pay it. The latter alleged in his bill that it was then represented by the defendants not to exceed eight thousand dollars; while they denied making such a representation and gave an explanation as to how the matter was—and then averred that an account was stated between them and Lampson in July one thousand eight hundred and twenty seven, when the balance, being ascertained and admitted, was settled by Lampson giving them his note. Also, that this note was brought into a new account, embracing their subsequent transactions down to the tenth day of October one thousand eight hundred and twenty seven, when an account was again made up, the balance stated at twenty seven thousand five hundred and ninety three dollars and Lampson signed an acknowledgment at the foot of its correctness and of this balance being justly due; and they averred that the whole of such balance remained due when the complainant assumed the debt. No accounts were set forth prior to the account of the tenth day of October one thousand eight hundred and twenty seven.

The exception to the answer was taken on the ground of the defendants not having set forth and discovered their accounts with William Lampson from the commencement of their dealings with him up to the time of filing the answer.

Mr. Storrs for the defendants.

Mr. J. W. Gerard for the complainant.

April 28.

THE VICE CHANCELLOR:—The statements in the answer are undoubtedly sufficient, in the first instance, to show a stated account between the debtor and creditor; and between the defendants and the present complainant it is as valid and binding as between them and Lampson.

In order to entitle Lampson or the complainant to have the accounts opened, it would be necessary that they should

point out errors or charge fraud in the present or preceding accounts which form the series from the commencement of their dealings. This has not been done.

The principal allegations in the bill, upon the subject of these accounts, are that the complainant was informed by Lampson and he believed, at the time of the assumption of the debt to the defendants, that he, Lampson, did not owe them any thing upon a just settlement of accounts or, at all events, much short of eight thousand dollars, and no account was ever rendered to the complainant by the defendants of the balance due to them by Lampson and assumed by the complainant or of said Lampson's account with them. Manifestly, I think, proceeding upon the idea of open, subsisting accounts between them; and not of accounts made up and balances struck and which were false or erroneous. A defendant may plead or set up in his answer a stated account to a bill for an account generally. This will be *prima facie* a bar to any further accounting; and it will not be entirely opened, except upon a bill for that purpose and therein charging fraud or other sufficient cause: *Dawson v. Dawson*, 1. Atk. 1.; *Sumner v. Thorpe*, 2. Ib. 1. A party may, doubtless, be permitted to surcharge and falsify, without opening an account: yet, for this purpose, it would seem to be necessary to charge some specific error or omission in the account or, at all events, show the accounts to be erroneous: *Taylor v. Hayling*, 2. Bro. C. C. 310. and in 1. Cox. 435.; *Johnson v. Curtis*, 3. Bro. C. C. 265; *Chambers v. Goldwin*, 9. Vesey, 266.; *Drew v. Power*, 1. Sch. & Lef. 192. And when a bill is brought to impeach a stated or settled account and it charges that the complainants had no counterpart of the account and prays the same may be set forth, the defendant will be obliged to do so or annex it by way of schedule to his answer or plea, although he pleads or sets up in his defence that it is a stated account. The reason for this is, that without a discovery of the account itself, the complainant will have no means of pointing out the errors upon the face of it, provided any exist: *Hankey v. Simpson*, 3. Atk. 303.

But the present is not a bill to impeach the accounts between the defendants and Lampson. Its scope and object,

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so far as the complainant assumed Lampson's indebtedness, is to ascertain the amount of the same ; and which depends, as he alleges, upon the just settlement of the accounts between them. The defendants undertake to answer, and it is true, they are bound to answer fully—but I think they do answer fully on the point of indebtedness and as to its amount, when they say that shortly before the complainant entered into the engagement with them to pay Lampson's debt, they and Lampson accounted together, struck a balance which he acknowledged in writing to be correct and justly due to them and that the schedule annexed to their answer contained the account thus stated. This account must be deemed correct and conclusive, until it is impeached for fraud or error. Lampson does not appear to have ever questioned the correctness of any of the accounts or sought to open them ; and if the complainant would do so, I consider, upon the authorities cited, he should have framed his bill differently or have moved to amend it.

The case made by the bill in my opinion does not warrant the prayer " that the defendants may set forth and discover their accounts with Lampson from the commencement of their dealings with him up to the time of filing the answer and annex all such accounts to their answer." It will be of no avail to have a discovery of all these accounts, unless the complainant can impeach or be permitted to surcharge and falsify them ; and there is no foundation laid for either in the bill. For these reasons and upon this ground the exception to the answer should have been disallowed.

I must overrule the master's report. No costs are asked by either party against the other.


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This Court has concurrent jurisdiction to compel contribution, in regard to a public assessment, as between the owner of the fee and his tenant holding part, who covenants to pay assessments but whose name does not appear on the commissioners report.

W. leased lots of land in New York to C. The latter covenanted to pay taxes, rates burthens, services, works and impositions, &c. which might be imposed or ordered to be done, &c. W. (the landlord) was owner of a larger adjacent range of lots. An estimate and assessment took place during the term for opening a public square. A part of W's land (not leased) was required for the purpose, while a larger part, including the leased lots was not wanted. The commissioners, in estimating benefit and advantage, had calculated the lots of W. separately and ascertained the benefit to him, by reason of his interest in the lots not taken above the loss for those taken at \$3944. The tenant (C's) name did not appear upon the commissioners proceedings or documents. Their report was made up by the corporation-counsel, in the aggregate of benefit over excess and not in detail agreeably to the commissioners calculations while the benefit to the premises under lease was assessed by the commissioners in their calculations, with the rest, against W. at \$12⁶⁵. W. filed a bill against C. for contribution. A general demurrer was interposed; which was overruled and an intimation given that the tenant might be held liable to contribute towards the \$3944., but that the complainant would not be allowed to go out of the commissioners report and consequently might not to go into parol proof, but must rest on the report.

On the first day of February one thousand eight hundred and twenty five, the complainant demised and leased to the defendant Samuel D. Craig two lots of ground in the twelfth ward of the city of New York, for the term of twenty one years, at the annual rent of thirty dollars— subject to renewal or to pay for the improvements. The defendant covenanted in the lease "to pay, bear and sustain, execute and perform all such taxes, rates, burthens, services, works and impositions whatever, whether ordinary or extraordinary, that might be assessed, laid, imposed or legally ordered to be done, paid, executed or performed thereupon in respect to or by reason of the said premises or any part thereof, whether by reason of any existing law or ordinance or any that might thereafter pass."

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The demised premises were a part of a larger tract of about three hundred lots, all of which belonged to the complainant. During the continuance of the term and about the

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twentieth day of April one thousand eight hundred and thirty two, the corporation of the city of New York resolved to open *Union Place*; and for this purpose, procured the appointment of commissioners of estimate and assessment in the usual manner. The commissioners proceeded in the discharge of their duty and made their report, bearing date the sixteenth day of March one thousand eight hundred and thirty three, and deposited a copy thereof in the proper clerk's office for the inspection of whomsoever it might concern; and gave notice thereof by public advertisement and that the report would be presented for confirmation to the Supreme Court on the fourth day of April then next following. When the time arrived, the commissioners made and signed an additional report to the court, stating that certain objections, papers and documents annexed and none other had been presented to them against their estimate and assessment and that they had reconsidered the report, but were of opinion it did not require any correction, alteration or addition.

On the fourth day of April one thousand eight hundred and thirty three, the report was duly confirmed by the Supreme Court.

In it three several pieces of land, described in the proceedings and belonging to the complainant, were required for the purpose of opening *Union Place*; and fourteen adjacent pieces of land, which were therein reported to belong to the complainant, were mentioned as not being wanted for the purpose, being about two hundred and sixty six lots in number (as numbered by the commissioners in their calculations upon their benefit map, as well as in the report.) The commissioners estimated the benefit and advantage to the complainant from such opening of *Union Place*, by reason of his interest in the adjacent lots and parcels of land not required to be taken for the purpose, over and above his loss and damage in consequence of relinquishing his interest in the parcels to be taken, at the sum of three thousand nine hundred and forty four dollars; and, in making their calculations for the said estimate of benefit and advantage, they did not make the same upon the lots of the complainant together, as ascertained in their official report, but did so in refer-


ence to every distinct lot, piece or parcel of land assessed for the benefit arising from the improvement which was comprehended within the range of such assessment. Their report was drawn up from such calculation by the counsel for the corporation, not in detail agreeably to the calculations, but in the aggregate of the excess of loss over benefit or benefit over loss in reference to each individual interested in lands benefitted by as well as taken for improvement. In consequence of this, the benefit assessed upon the premises leased to the defendant was assessed upon the complainant in connection with his other property in the vicinity and was deducted from the damages which would otherwise have been allowed to the complainant in respect to the lands taken from him for the purpose of the improvement; while his interest in such lands was supposed to be reasonably worth and his damages for taking the same were estimated and valued by the commissioners, in their calculation, at fifty four thousand and nine hundred dollars, and the assessments of benefit upon his adjacent lots were estimated at various sums according to the size of the lots and their contiguity to Union Place; and on the lots leased to the defendant, the benefit was estimated by the commissioners, in their calculation, at twelve hundred and sixty five dollars—the lots being marked on their benefit map as belonging to the complainant but the whole assessment of benefit thereon was assessed upon the complainant and no assessment of benefit was made upon the defendant in reference to the premises held by him under the lease which were comprehended in and formed a part of one of the benefitted parcels of land belonging to the complainant not required for the improvement. The twelve hundred and sixty five dollars, so assessed upon the complainant for benefit in respect to the premises so under lease to the defendant, added to the other assessments of benefit upon the complainants, amounted, in the whole, to the aggregate benefit sum of fifty eight thousand nine hundred and forty three dollars, from which amount the counsel, in preparing the report, deducted the fifty four thousand and nine hundred dollars allowed for damage and only set forth, in the report, the excess of benefit over damage upon the complainant at three thousand

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nine hundred and forty four dollars—whereas (as was alleged in the bill) if the official report had been made out in detail, agreeably to the calculations of the commissioners, the leasehold lots of the defendant would have been charged with the twelve hundred and sixty five dollars and which the defendant would have been bound to pay.

The bill in this cause set forth the above facts ; and then suggested that, as the complainant was advised, the defendant's liability could not be enforced in a court of law—at all events, not beyond a proportional contribution towards payment of the three thousand nine hundred and forty four dollars—and that his liability, even then and to this extent, was doubtful ; insisting, however, that by virtue of the covenant in the lease, the defendant was bound in equity to pay the whole sum of twelve hundred and sixty five dollars, as being the proportional part of the whole amount of damages for opening Union Place fairly chargeable upon the premises. It prayed, that the twelve hundred and sixty five dollars might be decreed to be a charge upon the leasehold estate, with interest from the time of the confirmation of the commissioners' report ; and the defendant be decreed to pay the same or, in default thereof, that his leasehold estate might be sold for the payment, with interest and costs.

The defendant interposed a general demurrer ; and took the broad ground of the remedy, if any, being at law upon his covenant ; and that this court had no jurisdiction of the case or, if it had, there was no equity in the bill to entitle the complainant to relief.

Mr. Craig in pro. per., in support of the demurrer.

Mr. Ulshoeffer for the complainant.

October 13.

THE VICE-CHANCELLOR:—It is not disputed in this case that the covenant of the defendant would extend to and cast upon him the burthen of an assessment for opening Union Place under the proceedings set forth in the bill, provided such an assessment had been imposed directly upon the lots of which he was the lessee. And it appears to be equally within his covenant to pay any assessment which might be made upon these lots in conjunction with other lots by one

general assessment upon a larger tract which should include them (and a part of which general assessment must, by a necessary consequence, attach proportionably to each lot or parcel.) The words of the covenant do not require the assessment to be made upon the defendant by name, either as owner or lessee, nor upon the lots as distinct and separate parcels of land. He is to pay all such taxes, rates, burthens and impositions as may be assessed, laid or imposed in respect to or by reason of the said premises or any part thereof; and the statements in the bill clearly show that an assessment for the opening of Union Place had been laid in respect to and upon the lots—they being, at the same time, parcel of a large number of lots taken collectively and assessed on account of their contiguity to the place opened as a public square. This assessment has been made upon the complainant as the owner in fee of the land lying within a certain range, benefitted by the improvement, and the boundaries and description of which were given so as to include the lots held by the defendant under lease: and although the defendant, as has been before said, is not named and his lots are not designated, yet it is certainly within his covenant to bear a proportion of the common burthen—what, in point of amount, it is or shall be, is not now the question.

The only difficulty, in getting at the amount, is in the admission of parol proof. If the report of the commissioners had specified the amount assessed upon these particular lots, it would have been, after confirmation, conclusive; and the complainant would only have had to bring his action at law upon the covenant. He could not have entertained his bill, if his remedy at law stood so clear and perfect. But, as other evidence, in addition to the facts furnished by the report of the commissioners, will be necessary—not for the purpose of contradicting or varying the report (as far as it goes) but to ascertain the proportion which the defendant ought to pay and then to compel a contribution by the defendant in virtue of his covenant, I am inclined to think it is a case in which this court has, at least, a concurrent jurisdiction with courts of law. Contribution, in a variety of cases, forms a head of equitable jurisdiction; and it appears to me this is one in which it may be enforced to a certain extent.

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The complainant cannot set up any claim inconsistent with the report of the commissioners. No fraud, accident or mistake is alleged as a ground for setting aside the report or reforming it. It was the complainant's own fault that he took no measures to procure the commissioners to distinguish in their report between the amount which they intended to assess or which they deemed chargeable upon the leased lots of the defendant as distinct from the other property; and it is no ground of relief now that he did not discover the error or omission in time to make objections to the report or that he was ignorant of the necessity of laying the lease before the commissioners. With ordinary diligence, he might have avoided all the difficulty which, out of this omission, he may now have to encounter. His own remissness and ignorance, when not the result of accident or mistake, misrepresentation or fraud, will not avail him: *Penny v. Martin*, 4. J. C. R. 566.

It appears to be well settled that no parol evidence can be received for the purpose of contradicting the report in respect to sums awarded or to show that the commissioners intended differently from what they may have expressed: *Turner v. Williams*, 10. Wend. 139.; and I think it is extremely doubtful whether the complainant, in the present case, can be permitted to travel beyond the report and show, by extrinsic evidence, such as the arithmetical calculations of the commissioners and their marks upon the map, that twelve hundred and sixty five dollars would have been assessed upon the lots for benefit, if the commissioners had made the assessment in detail and not in the aggregate. The defendant may well say he is not to be charged with this specific sum: because he has had no opportunity of objecting to it—and also that if it had appeared in the report, he might, perhaps, have succeeded in showing the amount to have been exorbitant and out of proportion compared with assessments upon other lots—or that the value of property required for the improvement which this, with other assessments, was intended to compensate, was estimated too highly. There is, to my mind, great force in all this; and it shows, in as strong light—as in the case of

Turner v. Williams—the impropriety of admitting parol evidence.

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Without passing definitively upon the subject at present—the same argument does not hold good in respect to the three thousand nine hundred and forty four dollars which was actually assessed, as appears by the face of the report. The defendant, although not named as the lessee or owner, seeing, as he might have done, that the latter sum was assessed for benefit to property which included the lots leased to him, was at liberty to object as a party interested; and his objections, if any had been made, must have been attended to. It does not appear to me inconsistent with the report to hold the defendant liable to contribute to the payment of this sum; nor subject to the same objection in relation to the admissibility of parol proof. It comes somewhat within the case of *Astor v. Miller*, 2. Paige's C. R. 69. and, on appeal, 5. Wend. 603., where the court entertained jurisdiction for the purpose of adjusting the rights of parties in relation to sums awarded and assessed under a similar proceeding.

At all events, I think there is enough, upon the principle of enforcing contribution, to give this court jurisdiction and put the defendant upon answering the bill.

The demurrer must, therefore, be overruled with costs.

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VAN HOOK, administrator, &c. and others v. WHITLOCK
and others.

It is a general rule that no advantage can be taken of the statute of limitations as a bar to a plaintiff's demand, unless the defendant either pleads it, or insists upon the same by his answer. But, the like strictness and particularity are not required in an answer as in a plea; although enough ought to be stated to put the facts in issue upon which the benefit of the statute is claimed.

Defendants, being desirous of protecting themselves under more than one provision of statutory limitations, set up in their answer that as to all the causes of action of which there was concurrent jurisdiction in courts of law and equity, such causes did not accrue within six years before the filing of the bill and as to all other causes of action, they did not accrue within ten years; and they insisted also upon a lapse of time generally: *Held*, to be sufficient to take advantage of any statute of limitations which might apply.

Distinction between remedial and penal parts of statutes.

Upon every statute made for the redress of any injury, mischief or grievance, an action lies by the party aggrieved, either by the express words of the statute or by implication. This was the doctrine of Ch. Baron Comyn; and it is here recognised.

The injured party only can sue upon a remedial statute.

February Bill by creditors of the Commercial Insurance Company
18. 19. 20. of New York against stockholders, for the purpose of mak-
1834. ing them personally liable. A sweeping plea of the statute
of limitations had, in the first instance, been interposed; and
Pleading. this was disallowed by his honor the Chancellor: see, 3.
Statute of *Paige's C. R.* 410. The cause now came before the Vice-
limitations. Chancellor of the first circuit upon bill, answers and proofs.
Statute. The defendants severed in their pleading, but most of them
still relied upon the statute of limitations, in, about, the fol-
lowing words: "And these defendants further answering
severally each for himself only as to so much and such part
of the said supposed causes of action or suit and each and
every of them against these defendants respectively in the
said bill of complaint alleged, whereof there is concurrent
jurisdiction in the courts of common law and courts of equi-
ty, say that if the same supposed causes of action or suit or
any of them ever existed, which these defendants respective-
ly do in no sort admit, the same supposed causes of action
or suit or any or either of them did not accrue at any time

" within six years next before the filing of the said bill of complaint or at any time within six years next before process to appear and answer thereto was sued out and served on these respective defendants; and that these defendants respectively have not at any time within six years next before the filing of the said bill of complaint promised or agreed to or with the said complainants respectively or any of them, either in their own right or in their respective character of executors, administrators or assigns, as set forth in the said bill of complaint, or to or with any of the person or persons from whom the said complainants respectively claim or pretend to deduce their respective right to sue in this behalf or to or with any person or persons whomsoever to come to any account for or pay or in any way satisfy the said complainants or any or either of them or any person or persons whomsoever any sum or sums of money for or by reason of any of the matters, transactions or things in the said bill of complaint charged or alleged; nor have the said complainants or any of them or any of the persons from whom they respectively claim to deduce their right to sue in this behalf at any time within six years next before the filing of the said bill of complaint, to the knowledge or belief of these defendants, been under any of the disabilities mentioned and described in the acts and statutes of this state for the limitation of actions in this behalf; and as to all the other matters in the said bill of complaint alleged or charged and for which this suit is brought, these defendants severally answering each for himself say, that if any causes or cause for filing the said bill of complaint, in respect of the matters last mentioned or any of them, ever existed, which these defendants respectively do in no sort admit, the same did not accrue at any time within ten years next before the filing of the said bill of complaint nor within ten years next before suing out and serving on these defendants respectively process to appear and answer thereto. Nor have the said complainants respectively nor those from whom they respectively claim right or title to bring this suit, been, to the knowledge or belief of these defendants, at any time within ten years next before filing the said bill of complaint under any of the disabilities in the said acts and statutes for the

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"limitation of actions mentioned. And these defendants do humbly insist on the several acts and statutes for the limitation of actions as a full and perfect bar to this suit and pray the same benefit thereof as if the same had been specially pleaded. And these defendants respectively pray and insist on the benefit of the lapse of time and all und every statute and statutes of limitation in bar of the said supposed claims and demands, each and every of them, of the said complainants respectively, each and every of them."

Mr. R. Sedgwick and Mr. D. D. Field, for the complainants.

Mr. G. Griffin, Mr. J. Anthon and Mr. R. Bogardus, for the defendants.

THE VICE-CHANCELLOR:—When this cause came before the Chancellor upon the plea of the statute of limitations, which was interposed by some of the defendants (see, 3 Paige's C. R. 409,) the form and substance of the plea were both considered; and it was held to be defective and insufficient as a bar. His honor, at the same time, settled the construction of the statute as applicable to the complainants claims, as well as the nature of the defendants liability, in such a way as relieves me from the necessity of going into an examination of some of the grounds of defence taken by the answers and urged at the hearing.

I am bound to regard it as a point already decided that the corporation of the Commercial Insurance Company was not dissolved until the charter expired, by its own limitation, on the second Tuesday of January one thousand eight hundred and twenty; and also, that then a right of action first accrued against the defendants upon their statutory liability as stockholders or corporators. Taking this as the starting point, the fact is now supplied by the proofs, of the present suit having been actually commenced—by filing bill and serving subpoenas—within ten years. If the demands should be deemed exclusively of equitable cognizance, and to which the limitation of ten years under the Revised Statutes might be applied, it, still, would not be a case where

the statute could be interposed as a defence : because, the time beyond which no suit in equity should be brought, had not elapsed. If it be viewed as a case not of exclusive but concurrent jurisdiction where this tribunal, in obedience to the statute and by analogy, applies the same rule that would be used by a court of law, then, according to the opinion of the chancellor, the six years limitation can have no effect : for an action of debt might be sustained against each defendant upon a statutory liability and such actions are not amongst those which are enumerated in the section declaring six years as a limit. So far, therefore, as the answers of the defendants rely upon this portion of the statute and set up the delay of the complainants for six years in bringing the suit, and as barring the remedy, the defence must fail ; and with regard to the ten years, it must likewise be insufficient upon the evidence, for the reason just given, even if the statute could, in this respect, be supposed to apply.

But—there is another clause of the statute which was not presented to the consideration of the chancellor and is now relied upon as applicable and available. I refer to a branch of § 6. in the Revision of the Laws of 1813, (1 Laws N. Y. 137.) A like clause is to be found in the 2 R. S. 298, § 31. It runs thus :—“ all such actions or informations which shall “ at any time be brought, sued or exhibited for any forfeit- “ ure or cause upon any statute made or to be made, the “ benefit and suit whereof is or shall be given or limited to “ the party aggrieved, shall be brought, &c. within three “ years next after the offence committed or cause of action “ accrued and not after.”

The first objection to this clause is, that a defence upon it is not set up in the answers and, consequently, the defendants have no right to avail themselves of the same at the hearing. Lord Hardwicke has said, no advantage can be taken of the statute of limitations as a bar to a plaintiff's demand, unless the defendant has either pleaded the statute or insisted upon it by his answer : *Prince v. Heylin*, 1 Atk. 494. ; and this is now the general rule, Mitf. 4th edit. 273. Still, the same strictness and particularity are not required in an answer as in a plea, although enough ought to be stat-

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ed to put the facts in issue upon which the benefit of the statute is claimed. I think the answers do state enough on the subject. They show that, supposing six years to be the limitation, the right of action did not accrue against the defendants within such period; also, that the defendants had not promised or done any thing to render them liable within this period; and likewise, that none of the disabilities mentioned in the statute had existed to prevent its running—and, upon the supposition of ten years possibly attaching, similar averments are made to meet the case. The answers also insist upon the benefit of the lapse of time and upon all and every statute and statutes for the limitation of actions in bar of the supposed claims and demands and each and every of them and pray the protection thereof as fully and effectually as if the same had been, in due form, specially pleaded.

Now, although the benefit of a three years limitation is not expressly claimed; yet the circumstances to negative any cause of action within the last six years or any promise within the time, would certainly amount to a denial of any right of action accruing or liability incurring within three years, while, insisting upon the law and every part which could be brought to bear, would, under the matters of fact so alleged and put in issue, if substantiated, entitle the defendants to the benefit of the shorter limitation, provided it were, (instead of the six or ten years) found to apply. If it should be made to appear that the bill was exhibited within six years of the period when the right to sue accrued, I will not say it would, under an issue in fact so framed as the present, be competent for the defendants (by setting up the three years limitation) to require the complainants to go on and prove that the right accrued to them within three years. Indeed, there is no pretence of such being the fact; and it is apparent, from the bill itself, that it was not exhibited until a lapse of more than nine years from the time when the defendants were first liable to be called upon for payment, as well as that a liability attached and the consequent right of action accrued immediately upon the dissolution of the charter, which happened on the second Tuesday of January, one thousand eight hundred and twenty. This is the period

alleged in the bill itself; and it sets forth transactions as late as the fifteenth day of April, one thousand eight hundred and twenty nine. The bill must, therefore, have been filed, after this time; and there is no evidence to show that any thing had taken place in the interval or that any fact exists to intercept or prevent the running of the statute. The question is entirely one of law, arising from the delay or lapse of time, about which, as a matter of fact, there is no dispute; and, as the defendants claim the full benefit of every limitation by statute on the subject of bringing suits, it appears to me the question is fairly presented whether three years is not a bar.

The 6 § of the statute limits, in the first place, the prosecution of penal actions, strictly so called, to cases where the penalty or forfeiture is given to the people only—while the prosecution is to be in their name; and also, where it is bestowed upon a common informer or any person who will sue, or upon the people and any person prosecuting what is usually denominated a *qui tam* action. So far the section is but a transcript of the 31 Eliz. ch. 5. § 5. which does not extend to actions allowed to be brought by the party aggrieved or where the remedy is given to such party: 13 Petersdoff's Abr. 282. In framing the statute of limitations for the state of New York, it was thought proper to go one step further and extend its provisions to cases of the last description; and hence the clause, which I am now considering, was introduced. Even with this additional clause, the statute was found not to apply where the penalty was given, by statute, to the party aggrieved and the people in moities: *Wilcox v. Fitch*, 20 J. R. 472. The omission is supplied by the Revised Statutes. The clause in question is not confined to penal actions or such as may be brought for a forfeiture. It applies to an action for any cause and upon any statute; and whether it be commenced for a forfeiture or other cause founded upon statutory liability and the benefit is given or limited to the party aggrieved, it must be brought within three years next after the offence committed or cause of action accrued, but not afterwards. This provision is evidently aimed at actions brought upon remedial statutes to recover damages for their viola-

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tion by any party aggrieved, as well as upon penal statutes for forfeitures to any such party. The distinction between remedial and penal statutes is very obvious, although they are sometimes blended in one statute, for it may be penal in one part and remedial in another: Doug. 702; Dwarris on Statutes, 641, 642. A remedial statute has for its object, says Petersdorff, the redress of some existing grievance or the introduction of some regulation or proceeding conducive to public good and is either affirmative or negative, as it prescribes or prohibits any thing in particular to be done or omitted. It is, in words, mandatory only, in which it differs from a penal statute, which enforces what it enacts by means of a penalty. The remedy, therefore, for breach of a remedial statute, is an action for damages by the party grieved; and for the breach of a penal statute, an action of debt for the penalty: 13 Petersdorff's Abr. 277 n. Thus, there may be two classes of cases to which the words "for any forfeiture or any cause upon any statute," may severally apply; and it remains to be seen whether the statutory liability, which rested upon the defendants on the second Tuesday of January, one thousand eight hundred and twenty, falls within the description of either class.

I do not think the 12 § of the charter or act of incorporation of the company is to be regarded in the light of a penal statute. It imposes no penalty or forfeiture upon the stockholders or corporators for suffering debts of the corporation to remain unpaid at the expiration of its charter. Still, it declares, in respect to all debts contracted by the corporation before this period, that the persons composing the corporation at the time of its dissolution shall, to a certain extent, be responsible in their individual and private capacities. Without this express enactment, they would not be thus responsible. The property and effects of the corporation only would be liable to be applied towards the payment of its debts; and should this prove insufficient, then the creditors would go unpaid. In order to remedy this inconvenience and as a matter conducive to the ends of justice and the rights of creditors, the legislature thought proper to create a personal responsibility on the part of the corporators; and thus the statute becomes a remedial one in the proper

and legal sense of the term. Although the act is silent as to the form of action and the mode of enforcing the liability, there can be no doubt of the right of creditors to sue at law upon the statute; and it is immaterial to the present purpose whether the action should be debt, assumpsit or on the case. It is sufficient that the law furnishes an appropriate remedy, in some form or other. When the mere form of the action or the action itself is not expressly given, it arises by implication. Ch. Baron Comyn lays down the law that, upon every statute made for the remedy of any injury, mischief or grievance, an action lies by the party aggrieved, either by the express words of the statute or by implication: *Com. Dig. Tit. Action upon statute*, A. 1.; and Judge Story has said that this is correct: *Bullard v. Bell*, 1 Mason's R. 290. And with respect to the person who is to sue upon a remedial statute, where it is likewise silent as to the person, it necessarily must be the injured one only. He is termed in law the party aggrieved: 2 Coke's Inst. 55, 118; 13 Petersdorff's Abr. 298. Hence, although there is no penalty or forfeiture imposed under the act incorporating the Commercial Insurance Company, we see, by the 12 §., a cause of action given in favor of creditors who happen to be parties aggrieved by the non-payment of the debt of the corporation arising to them by implication and to none but creditors: because, being a remedial statute, no other than the injured parties can sue. And it appears to me to fall directly within the letter and spirit of this clause of the § 6, of the statute of limitations before quoted, which requires actions to be brought within three years next after the cause of action accrued and expressly forbids the bringing of suit after the time thus limited.

I am unable to perceive how the effect of this enactment can be avoided. It appears to me to apply and to form an insuperable bar, at this late day, to the complainants remedy at law; and they can be in no better situation by coming into this court, where the jurisdiction (of enforcement) is merely concurrent. Nor do I apprehend there is any thing in my conclusion at variance with what has heretofore been decided. The question upon the plea before the chancellor arose upon the § 5. of our act of 1813, taken from the 21.

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 v.
 WHITLOCK.

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James I. and which had often been held not to embrace actions of debt founded upon a statutory liability; (the limitation of such actions, when brought for penalties or forfeitures, being provided for to a certain extent by the 31 Eliz.) In *Bullard v. Bell*, 1 Mason's R. 243., which was an action of debt by a holder of a dishonored bank note against a stock-holder in the bank, under the provisions of the bank charter making the stock-holders personally liable, the cause was placed, on the part of the defence, upon a part of the statute which, like the 5. § of our act, was a transcript of the 21 James I.; and Judge Story held, it did not apply. It does not appear whether the statute of New Hampshire contained provisions similar to those in 31 Eliz. having any additional clause like the one introduced into § 6. of our act. But, certain it is, no question was raised upon the effect or application of any such provisions. I am so well convinced the clause in the statute of limitations affords a complete defence and protection to the defendants, that I deem it unnecessary to occupy time in examining other points which have been made in the cause. It will be time enough to consider these, when I am found to be in error with regard to my exposition of the 6 §. of the statute of limitations and as to its furnishing a ground of defence.

There seems to be no other alternative than to dismiss the bill; but, as almost all the complainants are either executors or assignees and exhibit this bill in *autre droit*, it is proper to excuse them from the payment of costs.

1834.

GARDNER
v.
MOORE.

GARDNER v. MOORE.

A plea in abatement by a *feme covert* defendant is not the proper mode in this court of taking objection to her being sued as a *feme sole*. Therefore, where a judgment had been obtained against a woman as a *feme sole* and a judgment creditor's bill was thereupon filed against her alone, treating her still as a *feme sole*, and a plea in abatement, alleging her coverture, was interposed, such plea was overruled with costs.

A judgment-creditor's bill against "Sarah Moore." Plea 1834.
in abatement: that she was married to one William Smith,
who was yet living.

Plea.
Feme covert
sued as feme
sole.
Party.

Mr. H. M. Western, in support of the plea.

Mr. G. B. Hall, for the complainant.

THE VICE-CHANCELLOR:—The judgment was recovered against the defendant as a *feme sole*; and whether she was a married woman at that time does not appear. Upon the bill being filed to discover property liable to be applied in satisfaction of the judgment, she pleads in abatement of the bill that at the time of exhibiting the same, she was married to one Smith, who is still living; and the cause comes before the court upon the sufficiency and propriety of this plea as a protection to her for not answering.

In all the books of chancery forms and treatises on equity pleading and practice, no trace is to be found of a plea in abatement of a defendant's coverture; although we have frequent mention and precedents of a plea of a plaintiff's coverture or other disability to exhibit a bill without the intervention of a next friend, committee or the like. Thus furnishing a pretty strong argument that a plea in abatement is not the proper mode in this court of taking the objection by

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a feme covert to being sued alone ; and I have no hesitation in saying that it is not the proper course in a case like the present.

As she is here the debtor in the judgment, this defendant is, at least, a necessary party to the bill ; and although she has become *cóvert*, yet she may have property secured to her separate use and at her disposal. Now, with respect to such property, this court looks upon a *feme covert* as a person distinct from her husband. In a suit to charge her estate, he must be made a party ; but still a mere formal party, (Clancy, 358,) for she is treated as a *feme sole*, and may be compelled to answer.

If, in such a case or in any other, where the wife is a necessary party to a bill as a defendant, her husband is not joined, the objection may be taken by demurrer, provided the fact appear upon face of the bill ; and if such be the case, and it does not appear upon the bill, then the point can be had by plea or be put into the answer. In all which cases the complainant is driven to the necessity of amending, by adding the husband as a party. But the omission, in the first instance, to make him a party, ought to be no ground for abating the suit and putting the bill out of court—any more than in the ordinary case of the non-joinder of all proper persons as defendants.

For these reasons, the plea must be overruled as a plea in abatement. If the fact of coverture exists, the defendant must be left to present it in some other form, and unless the complainant seeks, by an amendment, to make the husband a party he will probably find a difficulty in obtaining a hearing of the cause.

It is unnecessary to consider the objections which have been taken to the form of the plea. Let it be overruled, with costs.

1834.

BIRDSALL

v.

WALDRON.

BIRDSALL v. WALDRON.

Where a vendor lets a purchaser in/o possession upon an understanding not to require the consideration until the buyer has a title, the latter cannot be called upon to bring the money into court. Nor can it be done where possession has been given without any stipulation made about the purchase money.

If a purchaser be in possession under a prior title or the possession commenced independently of the contract of sale, and the vendor be guilty of laches in perfecting the title, he cannot compel the buyer to bring the consideration into court.

The court will not order purchase money to be paid before a title is given, unless under special circumstances, such as taking possession contrary to the intention or will of the vendor, or where the purchaser makes frivolous objections to title, or throws unreasonable obstacles in the way of completing it, or is exercising improper acts of ownership whereby the property is lessened in value.

Where a vendor is resisting performance and does not recognize a bargain, such vendor cannot compel the vendee to pay the consideration into court.

A contract for the purchase of premises was alleged to have taken place between the complainant and defendant. Prior to entering into it, the complainant had been in possession under a lease from the defendant; and he still held on, claiming to be the owner of the fee by virtue of the alleged contract. When the bargain took place, the complainant paid to the defendant the sum of five hundred dollars, on account, and, previous to filing the bill for a specific performance, he tendered the residue, amounting to eleven thousand five hundred and seventy-five dollars, which the defendant refused—and on her part, she offered to pay back the five hundred dollars, and denied that the contract was binding upon her, alleging fraud in the manner of obtaining it, and insisting that it was inequitable and unjust in other respects, and that she ought not to be compelled to perform the same.

A petition was now presented by the defendant for leave to pay into court the five hundred dollars and to compel the complainant also to bring into court the sum of eleven thousand five hundred and seventy-five dollars, for the purpose

Feb. 24th,
1834.

Vendor and
Purchaser.
Paying consideration
into court.

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 v.
 WALDRON.

of being invested and rendered productive during the pendency of this suit: "such payments and the petition itself to be in no wise construed as affecting the matters in controversy or as recognizing the validity of the alleged contract."

Mr. C. F. Grim, for the motion.

Mr. D. S. Jones, contra.

THE VICE-CHANCELLOR:—For the purposes of this motion, it is in vain to say that the complainant is a trustee for the defendant in respect to the purchase money. He can only be so by the defendant's admitting the contract to be one which ought to be specifically carried into effect. Now, this the defendant denies. She will not admit the money to belong to her or that she is a creditor or *cestui que trust* of the fund. It would seem, therefore, to be an anomaly to require the complainant to deposit money in court to which she disclaims all right and pretension. If this defendant would only admit herself to stand in the relation of creditor or *cestui que trust* to the complainant, then there would be no difficulty: for the complainant is desirous of paying the money, provided she will accept of it. The argument, on the other side, however, is that the complainant insists upon being considered a purchaser and in possession, as owner, and whereby, (as it is contended) he is precluded from objecting to the application to his case of the rules which attach to any other purchaser in regard to payment into court or a deposit.

What then is the law of this court on the subject of paying in purchase money under contracts which are sought to be enforced against purchasers?

It appears to be this:—Where the vendor has thought proper to put the purchaser into possession, upon an understanding between them that the latter shall not pay the purchase money until he has a title, the purchaser cannot be called upon to pay the money into court; and the reason is, that the understanding becomes a matter of contract which

the vendor must abide by, and he cannot call upon the court to interfere and compel the purchaser to part with his money before he has a title where there is no surprise or difficulty thrown in the way of the vendor by the purchaser: *Gibson v. Clarke*, 1. Ves. & B. 500. Nor will the purchaser be compelled to pay the purchase money into court before the completion of the title where the vendor has voluntarily permitted him to take possession without any stipulation or agreement about paying the purchase money: for it was a folly to permit it: *Clarke v. Elliott*, 1 Mad. C. R. 606. And so, if the purchaser be in possession under a title anterior to the contract or provided possession were given independently of the contract and there is *laches* on the part of the vendor in completing his title, there, the court will not order the purchase money to be paid in: *Freebody v. Perry*, Cooper's R. 91.; *Fox v. Birch*, 1 Meriv. 105. In both the cases last referred to, motions were made for that purpose and refused. And from these and other cases, it appears to be well established, that the court will not order purchase money to be paid before a title is given, unless under special circumstances—such as taking possession contrary to the intention or against the will of the vendor or where the purchaser makes frivolous objections to the title, or throws unreasonable obstacles in the way of completing the purchase, or is exercising improper acts of ownership by which the property is lessened in value: *Bonner v. Johnston*, 1 Meriv. 366.; *Boothby v. Walker*, 1 Mad. C. R. 107.; Sugden on Vendors, 169.

No such circumstances exist in this case; and if the defendant stood before the court acknowledging the contract to be binding upon her and one which, as seller, she was to perform, but that circumstances existed to occasion a delay in the performance without any fault on the part of the complainant as purchaser, he would not, although in possession, be obliged to pay the purchase money before obtaining a title, and much less can he be compelled to part with the money while his vendor is resisting the performance.

So far as the motion is intended to affect the complainant in this respect, it must be denied, with costs.

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BIRDGALL
v.
WALDRON.

1834.

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TAYLOR
 v.
MILLS.

If the defendant thinks it advisable to pay in the five hundred dollars, to be invested or deposited with the Life Insurance and Trust Company, she can have leave to do so, without affecting the question or prejudicing the rights of either party.

TAYLOR v. MILLS.

Where a creditor, who issues an execution, becomes the purchaser of his debtor's household effects, and leaves them as a matter of kindness (as alleged) in the possession and to be used by the defendant without hire or reward, and that too for a space of eight years, the same will be considered fraudulent as to other creditors. This might not be so where a third person fairly bought and lent them out of mere kindness to the debtor. If an answer to a judgment creditor's bill shows that the persons, not before the court, claim property in the debtor's possession which the creditor attempts to reach, such persons or their representatives must be made parties before a decree can be had.

May 1st,
1834.

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Debtor and
Creditor.
Parties.

A judgment creditor's bill; and an attempt was made to fix the defendant as a partner in the firms of Mills, Minturn & Co. and Mills, Brothers & Co., but the answer and proof negatived it—and this ground was abandoned. The answer, however, disclosed furniture and other household effects to be in the defendant's possession and which the counsel for the complainant, John W. Taylor, contended ought to go towards the payment of his debt. It was enumerated in a schedule and stated to belong to John Hone, junr. (since deceased) and Sylvester H. Mills, and to have been loaned by them respectively to the defendant out of benevolence—the one being a brother of the defendant and the other a connection by marriage.

As to the articles of furniture said to belong to the estate of John Hone, junr., it appeared that previous to the tenth day of March one thousand eight hundred and twenty-three, he, John Hone junr., became the purchaser of the same at sheriff's sale, under an execution issued out of the Supreme

Court in his favor against the defendant, at the prices set forth in the schedule, amounting altogether to three hundred and ninety-eight dollars and fifty cents, and being desirous of letting the property to the defendant for the benefit of his family during such period as they might have a necessity for the same, an instrument in writing was executed between them of the date above mentioned, by which it was declared that in consideration of the premises and of one dollar paid by the defendant to Hone, the latter thereby let to him the goods until such period as Hone should demand the same from the defendant, the latter covenanting to render the same to Mr. Hone whenever requested.

The personal property, principally furniture, said to belong to Sylvester H. Mills, had been bought and paid for by him at different times from the year one thousand eight hundred and twenty-seven to one thousand eight hundred and thirty-one, and it was averred that the same had been lent to the defendant from motives of affection for the use of himself and his family, without charge, until called for, and so that when demanded, it was to be given up: although it appeared also that the amount of it had been debited against a salary which Sylvester H. Mills had to pay the defendant.

The points for the court were as to the legal effect of these transactions; and a want of parties—Sylvester H. Mills and the representative of John. Hone junr. not having been made defendants.

Mr. *Anthon*, for the complainant.

Mr. *Sedgwick*, for the defendant.

THE VICE-CHANCELLOR:—As to the furniture said to be-
long to the estate of John Hone junr.: was the buying it in
at the sheriff's sale, and leaving it in possession of the de-
fendant, colorable and fraudulent as to creditors? or, suppos-
ing the purchase to be free from fraud, was the relinquishing
possession to the defendant, in the manner mentioned, a gift
of the property and a revesting of the title in the defendant.
If either of these questions be determined against the com-

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TAYLOR
v.
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 v.
 MILLS.

plainant, then the case can be decided at once ; but if it shall be found that the property is liable to the defendant's creditors, then the complainant is met with an objection of want of proper parties.

As a general rule of law, the possession of goods remaining in the vendor or former owner is, in respect to creditors, *prima facie*, evidence of fraud in the sale or transfer. Still, the transaction is always open to be explained by the parties ; the presumption of fraud may be repelled by evidence ; and special circumstances have been admitted to form exceptions to the rule to such an extent as almost to do away with the rule itself : *Sturtevant v. Ballard*, 9. J. R. 343, 344 ; *Bissell v. Hopkins*, 8 Cow. 189, and note there. But the rule, in form at least, is now written. It is incorporated into the Revised Statutes to serve as a starting point in regard to evidence whenever the question of fraud arises upon a bill of sale or an assignment by way of mortgage of goods of which the vendor or mortgagor retains the possession : 2 R. S. 136. §. 5. The enactment is a convenient one. Parties set out with a presumption, which may be repelled by proof, of the *bona fides* of the transaction and by giving special reasons which the court can approve for the vendor's keeping possession. In the present case, all such explanation is wanting. Mr. Hone was a creditor by judgment. He caused a sale to be made under an execution in his favor. If the object had been to obtain payment of his debt, he would have suffered some of the goods to have been purchased by others—or, if he chose to buy in the whole himself for the purpose of making more of them (and which he might lawfully do), then he would not only have taken a bill of sale from the sheriff with a delivery of the goods, but he would have held the possession for his own use or have reserved something for the hire if let to others. Instead, however, of doing this, he enters into an agreement with his debtor to leave the goods in his possession—not upon hire or for a temporary purpose, but for an indefinite time and freely to be used by the family as long as they might have occasion for them ; and taking only the debtor's covenant to give up the possession whenever demanded. And the goods

were thus held and used by the debtor for a period of more than eight years, when this bill was filed.

I think it is apparent, from these circumstances, that the sheriff's sale was had for the mere purpose of giving a colorable title to Mr. Hone, the creditor, and not of paying his debt or of conferring upon him any real or beneficial ownership in the goods. Hence, the purpose was not legally honest towards other creditors. It was but the semblance of a transfer or sale; and although it took place under the forms of law, yet, where the creditor who issues the execution becomes himself the purchaser and leaves the goods in the possession and for the use of the defendant without hire or reward, it appears to me to be entitled to no better consideration than if the debtor had made a voluntary sale to his creditor and still retained the possession upon the like terms.

There are, indeed, cases somewhat analogous which are allowed to form exceptions to the general rule and considered as furnishing reasons for upholding a sale where the vendor or former owner is afterwards found in possession of the goods: but in every such case, there is some important fact to distinguish it from the present. Thus, in *Cole v. Davies*, 1 Ld. Raym. 724, the goods sold under a *fi. fa.* were purchased for a valuable consideration by a third person—not the plaintiff in the execution—and who left them in the possession of the judgment debtor to be sold and paid for by him as and when he could raise the money; and in *Kidd v. Rawlinson*, 2 Bos. & P. 59.—where Lord Eldon decided that a purchaser at a sheriff's sale might leave the goods in possession of the original owner out of benevolence and for a temporary and honest purpose—there the purchaser was a relative and not a creditor and did not buy the goods as a means of satisfying any debt of his own. So, likewise, in *Watkins v. Birch*, 4 Taunt. 822, although the plaintiff in a *fi. fa.* became the purchaser at a sheriff's sale, he afterwards, by agreement, let the goods to the defendant at a certain rent, which was regularly paid, and there it was held that the possession in the original defendant, under such circumstances, did not vitiate the title which the plaintiff acquired by the purchase. And in *Guthrie v. Wood*, 1 Starkie's Rep.

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367, a third person bought goods under a landlord's warrant of distress and left them in the possession of the tenant, the original owner; and Lord Ellenborough held that the purchaser's title was good against the creditors of the tenant, the case not being within the statute of Elizabeth against fraudulent conveyances, because the sale had been compulsory and by the landlord and not by the party owning the goods and there was no collusion between the landlord and tenant, which, from the intimation of Lord Ellenborough, would, if proved, have varied the case. None of these cases, in my opinion, serve as a precedent or authority for considering the sale and subsequent letting and the possession of the goods by the defendant in the present case as a valid transaction in respect to creditors. I am not warranted, in saying that the complainant has no right to have the property applied to the payment of his judgment and of the debts of other creditors in the same situation who may have filed bills in this court.

Then, with regard to the property said to belong to Sylvester H. Mills. As all of it was purchased and brought into the defendant's house, where it has remained and no sale or transfer has since been made to change the title or possession, the question whether it belongs to him and is liable for his debts seems to depend upon the circumstances of the original purchases. If bought by the brother or with his money and then lent by him to the defendant out of kindness and from benevolent feelings towards him and his family in consequence of his unfortunate condition in life, there can be no doubt, but the law would regard the brother's right of property in the goods and protect them from the claims of the defendant's creditors. But from the testimony it would seem that although, in the first instance, the property was purchased by the brother's means and paid for out of his funds, yet the purchases were principally made by the defendant himself and he was charged with the amount against his salary, the same being payable by Sylvester H. Mills out of his individual share of profits as a partner in the firms where the defendant was serving in the capacity of a clerk. If such be the fact, then, all the property became the defendant's. The brother, Sylvester H. Mills, who has

been examined as a witness for the complainant, seems to go far towards admitting it. There is some difficulty in reconciling parts of his testimony sufficiently to warrant a dismissal of the creditor's claim on this score.

But, as before remarked, I am embarrassed with the objection of a want of parties. I am at a loss how to make a decree which shall affect the title and possession of the property without having before the court, as parties, the administrator of John Hone junior and Sylvester H. Mills. This objection is well taken. It is, however, not set up in the answer, and is made, for the first time, at the hearing. In ordering the cause to stand over for amendment by adding parties, neither party, under the circumstances, is to have costs of such hearing.

Order accordingly.

FAY v. JEWETT and another.

Exceptions should not be taken to an answer for insufficiency, unless the discovery required would have some bearing upon the point in controversy.

Exceptions to a report allowing exceptions to an answer. THE VICE-CHANCELLOR tested the point of sufficiency by the materiality of the matter; and said, exceptions should not be taken for insufficiency unless the discovery, when made, would have some bearing upon the point in controversy.

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TAYLOR
v.
MILLS.

May 12th.
1834.

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Exceptions.
Pleading.
Answer.

1834.

GORMAN

v.
LOW.

GORMAN, administratrix of GORMAN, deceased v. Low and others.

Infant took a lease of a lot of ground in New-York and left the city. The landlord obtained possession under the statute then in force concerning deserted premises. The tenant afterwards returned and filed his bill; but held, he should go to a court of law. Held also, that this court could have retained the bill and have given directions for a trial at law and enjoined the parties from setting up temporary bars or impediments, provided the same were against conscience and any such bars or impediments had existed. Equity cannot relieve against the provisions of a statute.

May 21.

1834.

Landlord
and Tenant.
Statute.

In the month of March one thousand eight hundred and twenty-seven the defendants, Cornelius Low and Nicholas Low, made a lease to Jeremiah Gorman of a lot of ground at the corner of Mc. Dougall Street and Houston Street in the city of New-York, for the term of twenty one years from the first day of November one thousand eight hundred and twenty-six, reserving an annual rent of one hundred dollars, payable quarterly:—with a power of re-entry in case the rent were unpaid for the space of ten days.

When Jeremiah Gorman took the lease he was an infant of about eighteen years of age. His father had given him a sum of money and with this he erected buildings upon the lot at a cost of about one thousand and three hundred dollars; and which were completed on the first day of May one thousand eight hundred and twenty seven. A main part of the house which he erected he underlet to one Berrian for a year and at a rent of two hundred dollars; another part was underlet to one Mc. Leod as tenant at a rent of forty dollars for a year; and a small part was occupied by his father free of rent.

A short time afterwards the lessee, Jeremiah Gorman, left the city and state; and it was not known where he had gone. There were various rumours about him; and he was reported to be dead.

In the month of February one thousand eight hundred and twenty eight a year's ground rent had become due; and

VICE-CHANCELLOR'S COURT.

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GORMAN
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LOW.

being unpaid, the defendant, Augustus Fleming, as agent for the lessors, proceeded under the statute of 13th April, 1820, (Laws of N. Y. Sess. 43, ch. 194.) to recover possession of the premises and to put an end to the lease. For this purpose, a demand in writing of the year's rent or of the possession forthwith was, on the fourteenth day of February one thousand eight hundred and twenty eight served upon Berrian, the under-tenant, addressed to him or Jeremiah Gorman the lessee. This demand not being complied with, application was then made to a justice for a summons, which was granted in the form prescribed by the statute ; and upon service and return of the same, such further proceedings were had before the justice that on the twenty sixth day of February one thousand eight hundred and twenty eight the justice rendered judgment that the lessors recover the possession of the premises, and thereupon they were put into possession—and from the first day of May one thousand eight hundred and twenty eight they had let the premises to other tenants.

In the spring of the same year, one thousand eight hundred and twenty eight, Jeremiah Gorman returned to New York ; and afterwards he appears to have made some application to the agent of the lessors to be restored to the possession of the property, which was refused—although the answer stated that they offered to give him the house provided he would remove it from the lot. The evidence showed it was slightly built and of little or no value to the owners of the land.

Jeremiah Gorman attained the age of twenty one years sometime in the year one thousand eight hundred and thirty ; and soon after filed his bill in this court against both the lessors and their agent, praying that they might be decreed to deliver up the premises to him under a new lease for the term or for the residue of it and the lessors account to him for the rents of the premises during the time they had possessed themselves of the property and prevented his use and enjoyment. He, however, died pending the suit ; and it was revived and prosecuted in the name of his administratrix.

CASES IN THE

Mr. Mulock, for the complainant.

Mr. D. B. Ogden, for the defendant.

THE VICE-CHANCELLOR :—The only question in this cause can be, whether the proceedings before the justice were regular and sufficient as against the lessee to put an end to the lease ?

This is purely a question of law. The objections taken at the hearing to the proceedings under the statute are 1. that, as the lessee was an infant, his estate was saved from forfeiture ; 2. that the alleged proceedings in the justice's court were not against the lessee but against the undertenant ; and 3. as to the lessee, they were void on their face. If upon these grounds or any other, the lessee was not divested of his estate or interest in the premises by means of the proceedings had before the justice, then the lease is still a subsisting one and the lessee or his legal or personal representative has only to bring an action of ejectment to recover the possession and for a compensation for the mesne profits by way of damages or an action for breach of the covenants of the lease for the eviction or disturbance of his tenants. The courts of law can furnish an ample remedy in some appropriate form of action where the question would be tried with more fitness than here ; and I cannot see the necessity of coming into this court.

It is not a case where temporary bars or impediments to a fair trial exist at law and which it might be the duty of this court to remove as being against conscience. The whole matter of the present suit must depend upon the effect of the summary proceedings before the justice ; and there is nothing to prevent a fair adjudication in an action at law. Hence, upon principles stated by Lord Redesdale in *Bond v. Hopkins*, 1 Sch. & Lef. 430, and by Lord Manners in *Blennerhasset v. Day*, 2 Ball & B. 104, there was no need of the aid of this court. With regard to the latter case, it is well to remark that the bill was retained to give the plaintiff an opportunity of bringing an action of ejectment to try the validity of an eviction of the tenant for

non-payment of rent and at the same time restraining the defendant from setting up a legal title in a mortgagee or the statute of limitations as a bar to the ejectment. But then, the present case is clearly distinguishable: for no such circumstance or obstacle exists here.

There is, however, another view presented of this case:—admitting the eviction to have been regular and binding and an actual forfeiture to have taken place, so as to deprive the lessee of all remedy at law, still it is said that this court has jurisdiction to relieve against such forfeiture upon just compensation being made; and, upon this ground the court is asked to restore the term and possession. From an early period, courts of law, as well as courts of Equity, were in the habit of relieving the tenant from a forfeiture or breach of the condition of his lease for the non-payment of rent. Such relief was, however, confined to cases of rent. Where an action of ejectment was brought, the court of law interfered to stay proceedings upon payment of principal, interest and costs at any time before an execution upon the judgment was executed. But equity went further and relieved even after execution executed, in proper cases, according to circumstances and where full compensation could be made: Platt on Cov. 204, 205, 206, and 565. At length, however, the legislature interposed and by statute regulated the practice of the courts upon the subject of ejectments by landlords or lessors against tenants under the clause of re-entry in their leases and restricted the right of tenants to relief, both at law and in equity, to six calendar months after the execution was executed; and declared, in substance, that, henceforth the lessor should hold the premises discharged of the lease. This put an effectual check upon the power of the courts. They could no more relieve after this period of time than they could alter or repeal the law itself; and hence the distinction that, although a Court of Equity, with a leaning against forfeitures where the party can be compensated, may relieve against the terms or conditions of a contract, yet it cannot against the provisions of a statute or conditions in law. This distinction was taken by Lord Macclesfield in *Peachy v. Duke of Somerset*, 1 Strange 447; and it was acted upon in *Keating v. Sparrow*, 1 Ball & B.

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367. Then, how does the present case stand? The legislature, in providing a summary mode of proceeding for landlords against their tenants, by the act of the 13th April, 1820. have not thought proper to allow any time for the tenant to redeem. He can save his term only by an immediate payment of the rent and costs or by giving satisfactory security for the payment within ten days after the decision or judgment of the magistrate against him. If he omits this, "the contract or agreement and the relation of landlord and tenant between the parties shall be thereafter cancelled and annulled." Thus an end is put to the lease and to the tenancy. It is absolutely forfeited by the express provision of the statute; and this is a forfeiture over which the court cannot exercise a control—for it would be impugning the authority of the statute. But a case is not thus situated where a forfeiture is still depending upon the contract of the parties; for there, where it relates merely to the payment of money, the court may interfere to prevent an advantage from being taken of the non-payment at a given day, provided the court can see that equal justice may be done by payments at a day subsequent.

I am of opinion no relief can be granted in this court. The bill must be dismissed. Under the circumstances and considering the suit has been latterly prosecuted by an administratrix, it must be dismissed without costs.

CHAMPLIN v. CHAMPLIN and others.

The word "*forthwith*" in the 56. rule of the court is to be construed *within 24 hours thereafter*.

Sept. 23d.
 1834.


Practice.
Construction
of Rule.

Motion to take exceptions off the files.

On the twenty-fourth day of May, one thousand eight hundred and thirty-four, the joint answer of Elizabeth S. Cham-

plin, John Clark, Israel Dean and John Depeyster was accepted to for insufficiency; and, on the eleventh day of June thereafter, an order was entered referring the answer and exceptions to a master. The latter, by his report bearing date August 23, 1834, found the answer sufficient; and this report was delivered to the complainant's solicitor about three o'clock in the afternoon of the twenty-sixth of the same August: who filed it on the next day (the twenty-seventh.) On the fourth day of September following, the complainant's solicitor filed exceptions to the report; and, on the same day, served a copy with a notice of having filed them. The copy was refused to be received.

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Mr. I. A. Lott, for the motion.

Mr. H. S. Mackay, opposed.

THE VICE-CHANCELLOR:—The question of practice involved in this case is, whether the exceptions to the master's report were filed in time? By the 56th Rule of the court the report upon exceptions is to be delivered to the party obtaining the reference, who is *forthwith* to file the same in the proper office; and if he does not except to the report within eight days *thereafter*, it will become absolute as against him. But the adverse party is to have eight days after service of notice of filing the report to except to the same; and if he does not do so within that time, then it becomes absolute, without order, against him. The present point is to be decided upon a construction of the words "forthwith" and "thereafter," as used in the rule: whether *forthwith* is to mean *the same day* and *thereafter* goes to the time of filing the report?

I take it that this "forthwith" is not to be construed into a necessity of doing the thing in a moment after delivery. The party must have time allowed him to make a copy. It is enough if it be filed during office hours of the same or subsequent day. The courts of law have explained the meaning of their word "instantly" into, twenty-four hours. And the same construction may be given to our "forthwith."

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The report, therefore, having been filed within twenty-four hours of its being delivered, is to stand as filed; and as the word "thereafter" has a reference to its antecedent "forthwith," I consider the exceptions also filed in time. A reference to note (1) p. 249 of Mr. Hoffman's Practice might have saved the present application.

Motion denied.

N. The V. C. was, at first, inclined to give costs, but, upon a re-consideration and inasmuch as the point appeared to be a new one, they were not allowed.

COUTANT and others, administrators of **VARIAN**, deceased v.
FEAKS.

A party who wishes to avail himself in a present suit, by way of estoppel or otherwise, of any particular fact as having been conclusively established in a former suit between the same parties, must show that the fact he relies upon was absolutely necessary to the finding of the verdict in the previous suit and without the ascertainment of which the verdict could not have been rendered. Hence, a question of co-partnership which came up collaterally in a former action—although passed upon there—was no bar to going into the point of co-partnership in the present suit.
 No ~~degrees~~ where evidence is equal on each side.

November
 18,
 1834.


Partnership.
Evidence.

Bill to establish a partnership between the complainants intestate; and the defendant and for an account.

The facts in this suit and the testimony adduced sufficiently appear in the opinion of the court.

Mr. J. Smith, for the complainant.

Mr. W. Silliman, for the defendant.

April, 6th,
 1835.

THE VICE-CHANCELLOR:—The bill in this cause alleges a partnership to have existed during a period of about eight years prior to the decease of the intestate, Isaac Varian,

which happened in the month of May one thousand eight hundred and twenty. The answer denies that a partnership ever existed; but, as the complainants waived an answer under oath and the defendant has accepted such waiver and not sworn to his pleading, the denial is not evidence against them. It is, however, incumbent upon the complainants to prove the fact of the alleged partnership in order to entitle them to an account; and whether this be sufficiently proved is the question I have to consider.

A question of partnership arose on the trial of a suit at law between the same parties, before referees, and wherein the present defendant was plaintiff. The latter there produced and offered to prove, as a part of his demand in the suit at law, an account for goods sold and delivered, which he called his store account, against the intestate. The present complainants objected to the introduction of the account upon the ground of a partnership in the business of the store where the account accrued; and because, whether any thing was due upon it or not, depended upon the settlement of the partnership accounts and which could not be gone into in the suit at law.

The referees heard evidence upon the point as to whether there had been such a partnership. It was a matter contested before them; and they came to the conclusion that a partnership had existed at the time the accounts accrued and they accordingly rejected the store account. In this decision the plaintiff Feaks acquiesced; laid aside the store account; and went on and recovered other legal demands which he had against the intestate.

The present complainants now insist that Feaks (the defendant here) is precluded from contesting any further the fact of a partnership, and contend that the question is put at rest by the decision of the referees. The effect of that decision, as it stands, undoubtedly is to preclude Feaks from suing again at law upon the account: for, as the demand has been once submitted to the referees and passed upon by them, their finding would be a bar to another action for the same cause. Such is the effect of a verdict and judgment—the claim has been submitted and passed upon and no inquiry is necessary as to the grounds or reasons of the finding. Still, if a party wishes to avail himself

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of any particular fact as being conclusively established by the verdict of a jury in a former cause between the same parties, he must show that the fact which he relies upon as thus established was absolutely necessary to the finding of the verdict in the previous suit and that, without the ascertainment of such fact, the verdict could not have been rendered as it was ;—and then, the verdict not having been reversed or set aside, it may be given in evidence to prove the fact when again brought in question or, in a proper case, the former verdict may be pleaded by way of estoppel. These principles are to be found in *Wood v. Jackson*, 8 Wend. 1. and *Lawrence v. Hunt*, 10. Ib. 80. Now, in the case under consideration, the question whether there were a partnership or not, arose upon the trial before the referees rather incidently and upon a collateral point. It went only to a part of the then plaintiff's demand. The referees excluded this part. It is true the exclusion was upon the ground of a partnership being satisfactorily proved. The trial went on upon other matters ; and the report was made :—but it was not necessary to it that the fact of partnership should have existed. It did not enter into the verdict or finding of the referees. It was only collateral or incidental to it ; and therefore the report of the referees and the judgment of the court furnish no direct evidence of the fact of a partnership—they leave it to be “inferred by argument or construction “from the judgment.” This is not enough to give it the effect of evidence : *Lawrence v. Hunt*, supra.

Then—as to the evidence in this cause. There are three witnesses on the part of the complainant's who testify to declarations or admissions made many years ago by the defendant Feaks of the intestate's having an interest with him in the store as a partner ; while there are the same number, although not entitled to the same credit, who swear to declarations of the intestate himself that he had no concern or interest in the store. But the point does not end here : a variety of other facts and circumstances are testified to by other witnesses and all tending to show the non-existence of a partnership or, at least, the improbability of one ever having existed. The complainants are bound to make it out with reasonable certainty. It is not enough for

them to leave it *in equilibrio* ; and I do not perceive the scale is made to preponderate in their favor.

There is not enough to justify me in decreeing a partnership account to be taken ; and even if there were, it appears to me very doubtful whether any benefit would result to the complainants.

The statute of limitations is set up and insisted upon in the answer as a bar to an account, even if a partnership had been shown to have formerly existed. This statute may sometimes be a bar to a suit in equity by one partner against another for an account: *Atwater v. Fowler*, 1. vol. 422 ; and I am inclined to think there is sufficient room for its application here. But upon the first ground, I am of opinion the bill must be dismissed. As the complainants have, however, filed it in *autre droit* and under circumstances which may have induced them to believe a partnership could be proved, the dismissal must be without costs.

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MINCHIN and others, infants, &c. v. MERRILL and another.

Circumstances which constitute a gift *inter vivos* (See 1. vol. 304,) again recognized. It seems, that where a debtor is particularly directed by his creditor to convert his debt into a trust fund, by setting the same aside for children, and he does so, (let the same be in the shape of securities, money or bank notes,) a trust will be created for such children, the debtor be a trustee and his administrator cannot touch the fund as assets. Mrs. T. directed her son in law M. to sell her house and lot, which he did. She came to reside with him and his family (wife and children). M. put the avails in his business ; and took a partner, but afterwards sold out to him and took his notes. In the meantime Mrs. T. repeatedly declared that the avails of the house and lot were to go to M's children and expressed a solicitude as to the same ; M. had been heard to admit the same ; and when he dissolved partnership he left his partner's notes (for which he had sold out) in the hands of a friend, acknowledging they were for the children, and went to the south and there died. His administrator got possession of them : But the court decreed them to belong to the children. Costs to all parties out of the fund.

Bill by the children of John Minchin deceased against Novemb. 21.
the administrator of their father, to reach a certain sum of 1834.
money which had come to his hands, upon the ground of its
Gift inter vivos.

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belonging to the complainants at the time of the father's death and as forming no part of his personal estate. They claimed the money as a gift from their grandmother Anne Thayer, who was since dead, as being in their father's hands in trust for them.

Anne Thayer, whose administrator was likewise before the court as a party defendant, formerly resided in Boston and where she had owned a house and lot. In the year one thousand eight hundred and twenty-seven, she came to reside in New-York with her daughter and son in law, who were the parents of the complainants. On her removal, she empowered her son in law to sell the house and lot in Boston; and which sale he effected for about the sum of two thousand and five hundred dollars. The money he put in the business of a hardware store in New-York. Shortly afterwards, the defendant, Eli Merrill, became a partner with him in the store. The partnership was continued; and the money remained in the partnership stock until the month of March one thousand eight hundred and thirty, when Minchin sold out all his interest in the goods and outstanding debts to one Foster for two thousand seven hundred and fifty dollars and took Foster's promissory notes for the amount, drawn payable to himself.

Previous to this time, his mother in law, Ann Thayer, and his wife had both died. Mrs. Thayer was about eighty-six or eighty-seven years of age at the time of her death.

In the month of December, one thousand eight hundred and thirty, Minchin left his family of children in charge of a Miss Sophia White; and went to the south, where he died on the seventh day of March following intestate. He also had left with Miss White the promissory notes given by Foster. Upon receiving intelligence of his death, the defendant Merrill immediately applied for and obtained letters of administration upon his estate—having first procured the eldest son, who was then of age, to renounce in his favor; and on the fourteenth day of March one thousand eight hundred and thirty-one he prevailed upon Miss White to deliver to him the notes made by Foster and which had been since paid to him.

This led to the filing of the bill—the children claiming

the money as belonging to them and the defendant Merrill insisting that it was assets in his hands, as administrator, for the payment of debts and to be accounted for in a due course of administration.

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The evidence to make out a gift consisted of the repeated declarations of Mrs. Thayer, to the effect that the proceeds of the house in Boston which had been sold and which were in the hands of Minchin she intended should go to his children and she hoped he would take care of it, at the same time expressing great anxiety about the safety of the fund. One of the witnesses, Mrs. Gray, testified, she frequently heard her speak of money in the hands of Minchin which she had given to his children; she said that Minchin held the money for the children and felt anxious about it and hoped it would be kept sacred. Another witness, Miss White, testified that she often heard Mrs. Thayer say to Mr. Minchin, "I want to know whether the money you received on the sale of my house is safe for the children, you know I always intended that money for my dear daughter's children;" and Mr. Minchin used to reply, he would keep it safe; that the old lady was very anxious about it for she knew that Minchin was embarrassed and she said she always intended that money for the children. The last conversation the witness heard between them on the subject was after the old lady was taken ill and about three days before her death. She then called Mr. Minchin to her and said she wanted to know whether the money was yet safe for the children, and he said it was. She told him she wanted he should always keep it so; he said he would; and she then requested he would every year add the interest to the principal.

Besides these conversations, the declarations of Minchin at other times were given in evidence. He had been often heard to say he had got the property secured for the children—had taken care of it and intended to keep it secure for them. This was while he was in partnership with Merrill. After he had sold out and held the notes of Foster and when speaking of their amount he said it was the children's money. Miss White likewise said that one evening when he came home he observed that he was afraid to have the

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children's money remain any longer in his business and he had that day sold out to Foster and taken his notes, amounting to two thousand seven hundred and fifty dollars. She further testified that when Minchin went to the south, he gave Foster's notes to her, saying they belonged to the children and he wished her to keep these notes for them until he came back. Another witness, Mr. Dayton, who was examined on the part of the defendant, stated he had heard it said, and he thought he heard Minchin himself say so, that he had borrowed whatever property he had of his wife's mother and that it belonged to his children and mentioned the amount as being between two and three thousand dollars. Miss White testified further to declarations of the defendant Merrill on the same subject; that when he applied to her for the notes and insisted upon having them, she told him that Mr. Minchin had given her the notes to keep for the children until he returned and the defendant rejoined that if she did not give them up he would have to sue for them; he said he would try and collect the money on them for the children and Mr. Minchin had always told him these notes belonged to the children and that it came from their grandmother—and upon the defendant's saying all this she, the witness, gave up the notes to him. An attempt had been made to throw discredit upon Miss White's testimony by contradicting her in relation to what she said of the habits of Minchin. To a question propounded, on her cross-examination, she answered, he was not what she would call an intemperate man—he was occasionally somewhat excited by liquor, but he never used to drink at home; while a number of witnesses had been examined to prove he was often intoxicated when from home and would sometimes go home so and that this was known to Miss White. But the Vice-Chancellor did not perceive the testimony to be much at variance nor as detracting from the force of her own evidence.

Mr. E. Paine, for the complainants.

Mr. J. W. Gerard, for the defendant.

THE VICE-CHANCELLOR:—The principal question is, whether there was an effectual gift of the money by the grandmother to the children and the father a trustee of the fund for their benefit? For if so, then it would not pass to his personal representative as a part of his estate; and there can be no difficulty in following it into the hands of the defendant.

There is no pretence here of a testamentary gift. Nor can the circumstances in this case amount to a *donatio mortis causa*. It is upon the ground of a gift *inter vivos* that the claim of the children is urged. In order to render this description of gift effectual for any purpose, it is not only necessary to shew an intention to give but also an actual delivery of the thing given—there must be a parting with the possession and all control over the property by the donor and a vesting of the possession in the donee or a third person in trust for the donee. This is the well established doctrine in courts of law upon the subject and which courts of equity also are bound to regard. In addition to the cases referred to in *Taylor v. The Fire Department*, 1 Edwards, V. C. Rep. 294, may be cited *Hooper v. Goodwin*, 1 Swanst. 486, and *Gaskett v. Gaskett*, 2 Y. & J. 502.

I consider the evidence makes out a case of a gift executed by Mrs. Thayer, a possession parted with, and all control over the fund relinquished on her part; and that Minchin became vested with it as a trustee for his children. It is true, the evidence does not show very explicitly what passed between the parties or what their mutual understanding was at the time the money was first received by Minchin. He was empowered to make sale of the house and lot, execute the conveyance and receive the purchase money. And from these facts it is argued that he became the debtor of Mrs. Thayer for the money and not a trustee of it for his children. I consider, however, a trust was created at that time and the gift consummated. Mrs. Thayer was upwards of eighty years of age and had come to spend the remnant of her days in the family of her daughter and son in law; and their children were, next to their mother, her only descendants. She had no longer any use for the money on her own account. Her services in the family, according to

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testimony in this case, were an equivalent for her board ; and it was natural she should wish to place the money at once in a situation where it would be of the greatest benefit to the family. She knew the embarrassed circumstances of her son in law and was, consequently, aware how the handing the money to him for the purpose of investing it in a stock of goods on his own account—thereby making it a debt against him—would be rendering the same liable for his previous debts ; while, by giving the money to the children and constituting their father a trustee, with permission to employ it in trade for the benefit of his family, it could not be attended with a like consequence. The declarations of both parties, which were so constantly made, are in accordance with this view of the transaction. Mrs. Thayer declared, not only that it was always her intention to give the money to the children, but that she really had given it—and spoke of the same as their money which their father held for them ; and in expressing her anxiety about its safety, it appears clearly that it arose for their sake and on their account, as owners of the fund and not on her own account as a creditor of Minchin. She intimated no design of withdrawing the money from the hands of her son in law or of reclaiming it as her own ; took no measures which a creditor would have made use of who was apprehensive that his debt was not secure ; and made no attempt to control the management or disposition of the fund as one belonging to himself or which was held in trust for her. Again, all the acts and declarations of Minchin show that he considered the money as belonging already to his children and not theirs merely in expectancy. He sold out his interest in the partnership when he became apprehensive his old creditors might attempt to interfere with the children's rights and the money payable by the notes he spoke of as being their money and the notes as belonging to them. The taking of them in his own name and the intention to resume the possession on his return from the south is not inconsistent with the idea of a trust on his part : for, at the time of depositing them with Miss White for safe keeping, he acknowledged such a trust.

I am not certain that his declarations and acknowledgments, though verbal, being made in good faith, as between

the children claiming to be *cestuis que trust* and the personal representative of the party admitting himself to be a trustee, may not be sufficient to prevent a devolution of the property upon the administrator: *George v. Howard*, 7 Price, 646. Lord Eldon, in *Ex parte Dubost*, 18 Ves. 140., speaking in reference to the gift of an annuity which was claimed against an executor, observed that although in one sense it might be represented as the testator's personal estate, yet the testator had committed to writing what seemed to be a sufficient declaration of his holding this part of the estate in trust for the annuitant. The Lord Chancellor had, in the same case before said, "that upon an agreement (voluntary) to transfer stock, this court will not interpose, but if the party had declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more and the court will act upon it." This principle may be applied here, even supposing it to have been a debt originally from Minchin to Mrs. Thayer. As a debtor, it appears to me that it was competent for him, with Mrs. Thayer's assent and in conformity with her declared wishes, to convert the money owing by him to her into a trust fund for the benefit of his children, by setting apart securities or money in bags or bank notes in his possession, designating it to be trust property, and that such an act on his part would preclude his personal representative from claiming the property or fund as assets of his estate: *Powell v. Cleaver*, 2 Br. C. C. 500. 515. I go further. I consider no violence is done to the evidence by drawing the conclusion that there was a completely executed gift by Mrs. Thayer and such a vesting of the property in trust for the children that her administrator, upon evidence of what had taken place, could not have recovered the money in an action against Minchin as a debt due from him.

The complainants are entitled to the money as a fund which belonged to them in their father's hands—the same not having formed a part of his estate. The money is in court; the share of the adult complainant may be paid over to him, and those belonging to the infant defendants must remain invested until they come of age, while the interest

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only (unless he gives the requisite security) is to be paid to their guardian.

As to costs. The complainants claim them against the defendant Merrill; while he insists upon being entitled to his costs out of the fund. He became administrator with the assent of one of the complainants who was competent to give such sanction. The appointment of an administrator was, in all probability, necessary for the purpose of collecting the money from the maker of the notes. They were made payable to Minchin; he does not appear to have endorsed or negotiated them; and there might, therefore, have been a difficulty in enforcing payment except through the medium of a legal representative of the deceased payee. The defendant appears to have acted in good faith and from good motives even towards the children. At the time he applied for the notes, he avowed his object to be the collection of the money for the children, provided, as it must be understood, that they should turn out to be the owners and entitled to it; and when he got the notes into his possession and received the amount of them, it was a difficult question for him to determine whether he would be safe in paying the money over to the children instead of claiming to hold it as assets for the payment of the father's debts. In some measure he stood in the situation of a trustee who requires the direction of the court for his protection; and under all circumstances, it is not unreasonable to allow the defendants, as well as the complainants, their costs, out of the fund.

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executors of GILBERT BROWN deceased, *et al.*

Widow had articles of personalty bequeathed her; and took possession of them, with the knowledge and assent of the executor. He afterwards sued her for the same; but submitted to a nonsuit. In making up his accounts, he charged the fees and expenses paid for the suit, which were allowed by a master but disallowed by the court.

Voluntary bonds given by a testator will be operative as debts against the estate, unless he was *non compos mentis*, or the bonds were obtained by fraud, or undue influence; but they will have to be postponed to bonds and simple contract-debts arising upon valuable consideration. Yet they have a preference of legacies.

Mere secrecy in the manner of giving voluntary bonds is not enough to impeach them.

Interest not allowed upon arrears of an annuity.

The produce accruing upon a specific legacy belongs to the legatee; but if the articles be unproductive and detained, no interest can be had out of the estate for the detention; if improperly withheld, the remedy is against the executor only.


A specific legacy does not carry interest.

For a statement of this case, the reader is referred to 1st *November 27*
vol. page 411. 1834.

It now came up again on exceptions to the master's report, upon the reference had by virtue of the decretal order before made.

The master reported, amongst other things, that Hachaliah Brown had in his hands belonging to the estate, including interest charged to him, six thousand two hundred and eighty-seven dollars and ninety-two cents; that three bonds of five hundred dollars each, executed by Gilbert Brown, one to the sister, another to the son and the third to the mother of Hachaliah Brown ought not to be allowed as just debts against the estate; that the personal estate was sufficient to comply with the provisions relative to the investment of the fifteen hundred dollars, that the real estate (subject to the widow's rights) was enough for the payment of debts; and that there was due to the widow:

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Accounts.
Bond.
Specific
Legacy.
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	For the value of the articles enumerated	
ISENHART	in the codicil and not delivered . . .	306, 51
v.	Principal and interest of the bond . . .	978, 33
BROWN.		
		<hr/>
		\$3286, 71

Hachaliah Brown had, theretofore, brought an action of trover against the widow in order to recover the household property bequeathed to her. It had come to trial when the plaintiff submitted to a nonsuit. His costs of this suit at law, amounting to one hundred and forty-three dollars and eighty-two cents, had been charged by him and allowed by the master as a proper charge against the estate.

Exceptions were taken by the widow to the allowance of the costs in the trover suit.

And Hachaliah Brown took six exceptions to the master's report.

1. Because the master had reported a balance of six thousand two hundred and eighty-seven dollars and ninety-two cents in his hands, whereas he ought to have only reported a balance of thirteen hundred and thirty dollars and sixty-one cents and interest.

2. Because the master had rejected the three bonds.

3. Because he had reported the estate sufficient to comply with the provisions relative to the investment of the fifteen hundred dollars.

4. Because he had reported there was due to the widow for arrears of interest upon the fifteen hundred dollars the sum of two thousand and one dollars and eighty-seven cents.

5. Because he had reported there was due to the widow, on account of the articles of personal property enumerated in the codicil, three hundred and six dollars and fifty-one cents and for the principal and interest of the bond nine hundred and seventy-eight dollars and thirty-three cents and that the aggregate amount due to the widow was three thousand two hundred and eighty-six dollars and seventy-one cents; whereas the master ought to have reported that the widow was not entitled to the said several sums.

6. Because he had stated the rights and interests of the widow erroneously.

And these exceptions now came before the court.

Mr. A. L. Mc'Donald, for the complainant.

Mr. W. N. Dyckman, for the widow Elizabeth Brown.

Mr. P. A. Jay, for the defendant Hachaliah Brown.

THE VICE-CHANCELLOR:—1. As to the exception taken by the widow Elizabeth Brown. This relates to the costs, counsel fees and expenses of the action of trover brought by the executor against the widow, amounting to one hundred and forty-three dollars and eighty-two cents. The executor failed in the action; and the master has allowed it to be charged against the estate. It appears to me it ought not to be so charged. May 18,
1835.

Although, in strictness of law, the executor had a right to the possession of all the personal property left by the testator and the widow could not take what was specifically bequeathed to her without his assent, inasmuch as it might be necessary for the payment of debts, yet if he were satisfied that no such necessity existed, it was competent for him to assent to her retaining the possession; and having once assented, he should not afterwards have brought the action against her. The defence which she had set up was that one or both of the executors had assented; and after some proof was gone into on her part upon the trial, in order to make out the fact, the executors submitted to a nonsuit. I think it is apparent that there was no necessity for requiring her to give up the articles of personal property which had been left to her by the will. The attempt can hardly be justified. It was certainly not for her benefit or the advantage of the legatees generally; and he must bear the expense himself. This exception is well taken.

2. Then, as to the exceptions taken by the defendant Hachaliah Brown. These are of more importance.

The first and second depend upon one question, namely,

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whether three certain bonds given by the testator were valid as debts against the estate? The executor alleges his having paid them and he claims a right to charge the amount against the estate. If he be permitted to do this, it will lessen the amount which the master has reported as the balance due from him—the master having disallowed the bonds. They are voluntary bonds, one of them was given to the sister of the executor, a second was in favor of his son, and the remaining one was given to his mother; each of these bonds was for five hundred dollars payable at or immediately after the death of the obligor and all bearing date the twenty-fifth day of May, one thousand eight hundred and twenty. The will was made previously, on the fifteenth day of June, one thousand eight hundred and eighteen, the codicil on the thirty-first day of July, one thousand eight hundred and nineteen, and the testator died on the twenty-seventh day of December, one thousand eight hundred and twenty.

These bonds, although voluntary and without valuable consideration, are nevertheless valid and operative as debts against the estate, unless they were obtained by fraud or undue influence or the testator had become *non compos mentis* at the time of giving them. This court, however, would not allow them to be paid in the course of administration to the prejudice of creditors having debts contracted for valuable consideration. The executor would be compelled to postpone such bonds even to simple contract debts: *Ram on Assets*, 277; but in respect to legacies, the bonds would have a preference: for it is said that a bond, however voluntary, transfers a right in the lifetime of the obligor, whereas a legacy arises from the will which takes effect only from the testator's death and therefore ought to be postponed to a right created in the testator's lifetime: *Jones and Powell*, ——— 1 E. Ca. Abr. 84.; *Cray v. Rooke*, Talbot's Cas. 156.; *Lechmere v. E. of Carlisle*, 3 P. Wms. 222; *The Lady Cox's case*, Ib. 339.

If these bonds then were invalid, it must have been because the testator was either of unsound mind at the time or there was some fraud or deception practiced upon him or some undue influence used to procure them. The testimo-

ny fails to make out any of these grounds. The evidence of the Reverend Mr. Haskell and of the widow, upon her examination as a party, are the strongest upon the subject of the testator's imbecility of mind: and even they go no further than to shew him subject to severe attacks of illness and which, while they lasted, appeared to impair his mental as well as physical faculties. But these were of short duration, did not exceed two or three days, and upon proper medical treatment he would recover. Except at such times, he was perfectly competent to conduct his own affairs and to give directions in relation to the management and disposition of his property. There was indeed no mental incapacity; and the bonds were given at times when he was able to go from home and not while labouring under any particular bodily suffering so as to affect his mind.

Nor is there any evidence of fraud or improper influence in obtaining the bonds in question, nor sufficient circumstances from which to infer either the one or the other. Secresy in the manner of giving the bonds is put forward for the purpose of raising a suspicion of some unfairness. This is not enough. Fraud and imposition must be made out by stronger evidence than this affords before the bonds can be impeached. As they are in the nature of testamentary gifts, they would be more likely to assume the appearance of secret transactions than ordinary bonds between debtor and creditor. The testator had a right to dispose of his property by giving bonds or by deeds of gift, as well as by will; and he was also at liberty to prefer Brown's family, as objects of his bounty, to his other relations, notwithstanding he made a will by which he had intended to leave them a portion of his estate which these bonds tend to disappoint. And without some proof to impeach the bonds, they must be permitted to have this effect: *Blackborn v. Edgley*, 1 P. Wms. 606.

If all proper parties were before the court, I should not be warranted by the evidence, as it now stands, in decreeing the bonds to be cancelled. I must consider the executor justified in paying them, provided such payments do not prejudice the rights of any person standing in the light of a creditor and entitled to a preference. The law on this sub-

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ject, with respect to creditors, has already been stated; and I consider the widow as coming within the principle and entitled to be first satisfied, not only in regard to the provision made for her by the will and codicil—her right to which has already been passed upon and, until altered, must be taken as the law of the case—but also in relation to the bond, taken in the name of Hachaliah Brown for her benefit. It is very evident the testator intended to give her bond the preference. His object was to make a more ample allowance to her and place her upon the same footing as the provision by the will; and those who took the other bonds must I think have understood at the time that whatever rights they thereby acquired were to be subordinate to those of the widow. No injustice will be done in giving her the preference.

Upon an understanding that the sanctioning of the three bonds is not to affect the claims of the widow, the first and second exceptions taken by the defendant Hachaliah Brown are allowed.

I apprehend this likewise disposes of the third exception: for there must be a re-stating of the accounts and the result will then show whether the personal estate is sufficient to enable the executors to comply with the provisions of the will relative to the placing out at interest the sum of fifteen hundred dollars for the use of the widow.

The fourth exception relates to the amount reported to be due to the widow for arrears of interest on the fifteen hundred dollars. The objection to this is that the master ought not to have allowed any interest to be due upon this sum, much less interest upon arrears of interest. The decretal order of the ninth day of April, one thousand eight hundred and thirty-three has already determined that she is entitled to the interest upon this sum of fifteen hundred dollars from the death of the testator, provided the personal estate amounted to the sum and there was sufficient other property to pay debts; and I understand from the master's report there is a sufficiency for these purposes. The arrears, therefore, amounting to one thousand three hundred and sixty-five dollars are properly allowed by the master; and the only question is as to interest upon such arrears,

computed by the master to amount to six hundred and thirty-six dollars and eighty-seven cents. I am of opinion this latter sum cannot be allowed. As I look upon this provision in the light of an annuity, the weight of authority is against allowing the widow interest upon arrears. The case of *Tew v. Earl of Winterton*, 3 Bro. C. C. 489. and in 1 Ves. Jr. 451. is directly in point; and interest on the arrears of an annuity was refused by Lord Hardwicke in *Bedford v. Coke*, 1 Dick. 178.; *Signal v. Brereton*, lb. 278; *Anonymous*, 2 Ves. Sen. 661. See also *Anderson v. Dwyer*, 1 Sch. & Lef. 391; 2 Roper on Leg. 249; Williams on Executors, 879. It may be difficult to reconcile all the cases upon this subject. Some of them acknowledge it to be discretionary with the court, under special circumstances, to give interest: 1 Hov. Supp. 126, 127; Belt's Supp. 293; Ram on Assets, 138. However, there are no special circumstances in this case to require the allowance of interest on the arrears of interest due upon the fifteen hundred dollars; and the master's report in this particular must be corrected.

The fifth and only other exception which requires any notice, relates to the allowance of three hundred and six dollars and fifty-one cents as being the value of certain articles of personal property specifically bequeathed to the widow and interest upon such value and the principal and interest of the bond for five hundred dollars given to the defendant Hachaliah Brown for her use. I see no objection to the interest on the bond as computed and allowed by the master: it being for a sum certain payable at a specified time and, like a pecuniary legacy, carrying interest from the time it is deemed payable.

I have, however, doubts as to the propriety of allowing interest upon the value of the personal property bequeathed to the widow specifically, which she did not happen to receive. Whatever produce accrues upon a specific legacy belongs to the legatee, because it is considered as separated from the general estate and appropriated from the time the testator died. Thus, where there is a specific legacy of stock, the dividends belong to the legatee. So, if animals are specifically given, the natural increase or product follows the ownership: 2 Roper on Leg. 188; Williams on E. 876;

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but if inanimate and unproductive articles of property are bequeathed and not delivered, it does not follow that the legatee is entitled to interest upon their value out of the estate by way of recompense for the detention—if improperly withheld, the remedy is against the executor personally. The case of *Apreece v. Apreece*, 1 Ves. & B. 364, shows that a specific legacy (as a ring, where the value is fixed by the testator) does not carry interest. I consider the master should not have allowed the one hundred and forty-three dollars and fifty-one cents for interest upon the one hundred and sixty-three dollars; and in this particular his report must likewise be corrected.

There must be a reference back to the master to amend his report accordingly; and the question of costs and all further directions are reserved.

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CHANCE v. ISAACS and another.(a)

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I gave C. his promissory note, and C. shortly afterwards gave his two notes to I. Prior to any of the notes becoming due, I. became insolvent and made an assignment of his estate, including the two notes, to a trustee for the benefit of creditors. C., in the meantime, had endorsed and passed away I.'s note, and when it became due he had to take it up. C. then filed his bill to restrain the trustee from parting with his two notes and praying that the one he held made by I., the insolvent, might be set off against his own two notes. But the court distinguished this case from *Lindsay v. Jackson* and dismissed the bill.

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 Set-off.

The bill in this case was filed on the seventh day of February one thousand eight hundred and thirty-four, by the above named complainant against the above named defendants; and on the same day an injunction was granted and issued according to the prayer of the bill.

The bill set forth that on or about the twenty-seventh day of September one thousand eight hundred and thirty-three,

(a) Affirmed, on appeal, see 5 Paige's C. R. 592.

the defendant Solomon I. Isaacs, being indebted to the complainant upon mercantile transactions in the sum of six hundred and eighty-seven dollars and twenty-eight cents made and delivered to the complainant his promissory note for that amount dated on that day and payable four months after date to the complainant or order. That the complainant, in the course of business and in full confidence that Isaacs would pay the note at maturity, endorsed and passed it away. That when the note became due, the defendant, Isaacs, did not pay it, nor make any provision for the payment, but became from that time insolvent. That, in consequence thereof, the complainant was liable and compelled to pay and did, on the thirtieth day of January one thousand eight hundred and thirty-four, pay the full amount of the said note at the Mechanics Bank in the city of New York; and no part of that amount had been repaid or in any way made good to the complainant by Isaacs or any other person and the note was in the complainants possession ready to be produced, when necessary; also that on or about the twenty-fourth day of October and fifth of December one thousand eight hundred and thirty-three the complainant made and delivered to said Isaacs two promissory notes, bearing date at those respective times and payable to said Isaacs or order—the first drawn at four months after date for two hundred and thirty-five dollars and six cents, and the second at six months for four hundred and seventy-one dollars and eighty-three cents and which two notes would respectively fall due on the twenty-seventh day of February and eighth day of June one thousand eight hundred and thirty-four; that very shortly before the filing of the bill, the defendant Isaacs made some transfer or assignment of all his property or some part of his property, effects and choses in action to the other defendant Isaac F. Smyth, apparently for the benefit of creditors and so that Smyth was merely a trustee of the property, effects and choses in action of Isaacs, but that the complainant had, in no way or manner, recognized such transfer or assignment. Also, that among the property, effects and choses in action so transferred by Isaacs to his trustee Smyth were the said two prom-

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issory notes of two hundred and thirty-five dollars and six cents and four hundred and seventy-one dollars and eighty-three cents made and passed by the complainant to Isaacs as above mentioned ; that these two notes exceeded by only about one hundred and ninety-six dollars and one cent the dishonored note of Isaacs which the complainant had been obliged to take up ; and the complainant, by his bill, offered to pay that balance or to pay it into court. And that the said two notes, drawn by the complainant as above mentioned, were still in the hands, power, possession or custody of Smyth, as the mere trustee of Isaacs. That said Smyth then knew or had been informed of the complainant's having been obliged to pay and of his being still the holder of the said note for six hundred and eighty-seven dollars and twenty-eight cents drawn by Isaacs and dishonored by him and taken up by the complainant as aforesaid ; that the said Smyth, as such trustee of Isaacs, was then about passing away the complainant's said two notes of two hundred and thirty-five dollars and six cents and four hundred and seventy-one dollars and eighty-three cents for the purpose of evading the just off-set which the complainant could have against the same through the said dishonored note of Isaacs of six hundred and eighty-seven dollars and twenty-eight cents ; that there was no endorser upon the last mentioned note to whom the complainant could look for payment of it ; that Isaacs was insolvent and that the complainant would lose the whole amount of the said note of six hundred and eighty-seven dollars and twenty-eight cents, unless the notes of the complainant for two hundred and thirty-five dollars and six cents and four hundred and seventy-one dollars and eighty-three cents should be restrained in the hands of the defendants so that the first mentioned note might be set off against the two last mentioned and the balance only be paid by the complainant. The bill then prayed that the defendants might be restrained from parting with, negotiating, hypothecating, loaning, discounting, secreting or disposing of either of the two promissory notes drawn by the complainant until the further order of the court and that the amounts to become due upon the same respectively might

be applied to satisfy the said note for six hundred and eighty-seven dollars and twenty-eight cents drawn and dishonored by the said Isaacs as aforesaid and the complainant pay only the balance of nineteen dollars and sixty-one cents or be allowed the same towards his costs and charges ; and that the complainant might have such further or other relief, &c.

The defendants severally demurred to the bill ; and the demurrers were argued and over ruled by the court at the July term.

On the twenty-second of August thereafter the joint and several answer of the defendants was put in ; and the cause now stood for hearing on bill and answer.

The answer of the defendants admitted that on the twenty-seventh day of September one thousand eight hundred and thirty-three, Isaacs, being indebted to the complainant in six hundred and eighty-seven dollars and twenty-eight cents for goods sold and delivered by the complainant to him at a credit of four months, made and delivered to the complainant the note for that amount mentioned and described in the bill and that the complainant endorsed and passed it away in the course of business and in full confidence that Isaacs would pay it at maturity. And the defendants say that Isaacs did expect and intend to pay, without any deduction or set-off to the holder (whether the complainant or any other person might be the holder) whenever the note should come to maturity. They further admitted that when the note became due, Isaacs did not pay or make any provision for the payment of it, he having become insolvent at its maturity and from and after that time and at the time of putting in the said answer being utterly insolvent, not having property of his own of any kind sufficient to pay all or any very considerable part of his just and lawful debts ; that, in consequence thereof, the complainant was liable and compelled to pay and on the thirtieth of January one thousand eight hundred and thirty-four did pay the full face of the note at the Mechanics Bank in the city of New-York, and that no part of it had been repaid or in any manner made good to the complainant by Isaacs or any other person and that the

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note was in the complainant's possession. The answer further admitted that on the twenty-fourth of October and fifth of December one thousand eight hundred and thirty-three the complainant made and delivered to Isaacs the two notes for two hundred and thirty-five dollars and six cents and four hundred and seventy-one dollars and eighty-three cents mentioned and described in the bill for a valuable and good consideration, namely, for goods sold and delivered by Isaacs to the complainant on or before the dates thereof and that Isaacs expected and had reason to expect that the said notes would be duly paid in lawful money to him or his assigns or indorsees as the case might be or to whomsoever should become lawfully the holder or holders thereof whenever the same should come to maturity. And the defendants averred that the complainant expected and intended to pay the same accordingly to the holder or holders thereof without any deduction or set-off whatever. The defendants, in their answer, further said that Isaacs did, on the eighteenth day of January one thousand eight hundred and thirty-four, previous to the maturity of all the notes and before the filing of the bill and before any request to him to set off the notes of the complainant against the note of Isaacs, appropriate, apply and assign his property, real, personal and mixed, for the benefit of all his creditors, including the complainant, as was set forth in the assignment made by him, of which the defendants exhibited a copy, which assignment included the assignment or transfer of the complainant's notes by Isaacs to Smyth, in trust for the benefit of the creditors of said Isaacs exclusively and in no manner whatever for the benefit of Isaacs and which was the same assignment referred to in the bill as transferring to said Smyth, as trustee, among other property, the said two notes made by the complainant to Isaacs. The defendants denied that Isaacs made any other assignment or transfer of the said notes to Smyth or to any other person or persons : and they especially denied that the said assignment thereof was made in any manner for the benefit of Isaacs : but they averred that the notes were assigned and transferred to Smyth in trust exclusively for the benefit of the creditors of Isaacs mentioned or referred to in the assignment, to which the de-

defendants referred as part of their answer. They further said that Isaacs became and was insolvent, as alleged in the bill; both at the time when his note became due and before, to wit, at the time of his making the assignment and was insolvent on the day of its date and so ever since had been and then was utterly insolvent and without any prospect or future means of paying his just debts, save by his future earnings. They further averred that the said assignment to Smyth was truly as well as apparently made to him for the benefit of the creditors of Isaacs; they denied that Smyth was merely a trustee of any of the property, effects or choses in action which formed the subject of the assignment or the trustee of Isaacs and for his benefit or subject in any manner to his control: but they averred that the assignment was made and executed and the trust therein and thereby expressed was created and declared in good faith for the benefit of the creditors of said Isaacs exclusively, but the said Isaacs, by reason of his insolvency, had not any interest in the said property assigned nor any other benefit then expectant or resulting therefrom than that the same should be duly applied to the lawful satisfaction of his just debts and this the defendants insisted and submitted to the court was not any such trust for the benefit, use or interest of Isaacs as in any manner restrained, prevented or defeated the complete transfer and assignment in fact and in law of the said two notes by Isaacs to Smyth—and they averred that the true and real interest of the said assignment was to invest in and transfer to Smyth, as part of the subject of said assignment, both of the said two notes in trust for the use and benefit of the said creditors of Isaacs and not otherwise. They further said, that the complainant had recognized the assignment co-equally with other creditors of Isaacs, that is to say, he had not refused and rejected absolutely all benefit from the said trust, but suffered the presumption of law in favour of his acceptance of the said benefit as a creditor to stand unrenounced, with the evident intention of claiming his share in the dividend which might be made among the creditors, if his bill of complaint should fail to procure the relief sought. The defendants admitted that the said two notes were transferred by Isaacs

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to Smyth by force of the assignment and averred that the said transfer was made in good faith for the use and benefit of the creditors of Isaacs and in trust for them and not in trust for Isaacs. They admitted that the two notes made by the complainant were in the hands or possession of Smyth at the time of the filing of the bill and then were in his power, but they denied that the same were in the hands, power, possession or custody of Smyth as the mere trustee of Isaacs and they averred that the notes were in the possession of Smyth as the mere trustee of the creditors of Isaacs and not otherwise. They admitted that the complainant held the said note of Isaacs and that he had repaid the amount thereof to some indorser, as he alleged. The defendant Smyth denied that he, as the trustee of Isaacs, was about passing away the said two notes; and that, on the contrary it was his obvious duty, as trustee for the benefit of the creditors, to retain them in his possession until they respectively should come to maturity without unnecessary and injurious loss by discount. And this defendant, Smyth, referring to this obvious and well known duty of a trustee for creditors in respect to such securities where no call for a dividend could be made, nor any occasion for expense could require such sacrifice to raise money (and he averred the complainant well knew such was the condition of this trust property) said, he should have retained the said notes until their maturity and if not then paid should have commenced a suit thereon in his own name for the benefit of the said creditors against the complainant. And the said defendant Smyth, denying all intention to deprive the complainant of his just rights, submitted to the court that the complainant, by his bill, sought to deprive the other creditors of Isaacs of their legal and just rights in the premises contrary to law and equity as theretofore known and established in this state. The defendants admitted that there was no endorser on whom the complainant could have recourse for payment of the said notes, but they denied that the whole amount of Isaacs' note to the complainant would be utterly lost to him unless he could have or be allowed the set-off which he sought in his bill. The defendants further stated that the consideration of the said two notes

respectively were goods sold and delivered by Isaacs to the complainant, and there never existed at any time any connexion between the transactions out of which the said two notes originated and the transaction out of which the note of Isaacs to the complainant originated, but the consideration of the notes made by the complainant and that of the note made by Isaacs were ever separate, distinct and disconnected from each other. They averred that all the interest of Isaacs in the said notes made by the complainant was, in fact and in law, transferred to and vested in Smyth for the benefit of the creditors of Isaacs before the maturity of the notes and the actual possession and property thereof delivered to and vested in Smyth not only by the said assignment but by indorsement thereof before the filing of the bill and before the note of Isaacs to the complainant became due and while, in fact, the said note was out of the hands and possession of the complainant and in the hands of some third person as the complainant in his bill shewed and alleged. The defendants, further answering, denied that they had combined or confederated together or with any person or persons in the premises or that they persisted or that Smyth persisted in any intention to pass away the said notes to defraud the complainant in any manner whatever, and Smyth denied that he ever alleged or pretended that either of the said notes was ever passed to him in the ordinary way of trade but, on the contrary, he had ever stated and averred that the said two notes were transferred to him as trustee for the benefit of the creditors of Isaacs in good faith and not for the benefit of Isaacs himself or any other person or persons; and the defendants admitted that the note of Isaacs to the complainant was still unpaid and that Isaacs became insolvent and stopped payment about thirty days before the day of the date of his said assignment.

Submitted on the bill and joint answer.

Mr. Charles Edwards, for the complainant.

Mr. George Sullivan, for the defendants.

THE VICE-CHANCELLOR:—When this cause was before me upon the demurrer, the latter was overruled, upon the

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ground alleged in the bill: that the defendant, Smyth, held the two notes given by the complainant to the defendant, Isaacs, merely as trustee for Isaacs. This did not interfere with the complainant's right of set-off, especially in equity.

The answer of the defendants has, however, placed the matter on different ground. It shews that Isaac F. Smyth holds the notes—not in trust for Solomon J. Isaacs; but for his creditors, under a general assignment for their benefit, made on the eighteenth day of January, one thousand eight hundred and thirty-four, and which was previous to the notes on either side becoming due.

As the cause is now submitted on bill and answer, the question is, upon the facts presented by the answer, whether the complainant has a right to set off Isaacs' note for six hundred and eighty-seven dollars and twenty-eight cents, which he holds, against the two notes he gave to Isaacs and which passed by his assignment to the defendant Smyth?

In order to give him this right, the note for six hundred and eighty-seven dollars and twenty-eight cents should have been due and payable and held by him when the transfer of the two notes was made by the assignment. At that time the complainant was not a creditor of the defendant Solomon J. Isaacs, with a right of any action against him. The note was outstanding in the hands of a third person, with the complainant's endorsement, but not payable until the thirtieth day of January, one thousand eight hundred and thirty-four; when, he was compelled to take it up as endorser. Then, for the first time, a right of action accrued upon the note; but, previous to this, Isaacs had parted with the two notes given to him by the complainant and thereby the mutuality of indebtedness between the complainant and Isaacs, (and which is necessary to a set-off,) was destroyed.

In order to bring this case within the principle of *Lindsay v. Jackson*, 2 Paige's C. R. 581, the note, which the complainant now seeks to set off, should have been due and held by him while the other notes were in Isaacs' possession; and then, by reason of the insolvency of Isaacs and the complainant being willing to forego the credit upon his own notes, and choosing to treat them as due, he would have an

equitable right to make a set-off at once ; and if refused, then to apply to this court for an injunction and for relief. Not being in the situation of a creditor, with a right to demand payment at the time the transfer to Smyth was made, the complainant has lost that right. He has now no such equity against the assignee. Upon the failure and insolvency of Isaacs, he, Isaacs, was at liberty to make such disposition and appropriation of his property in good faith for the benefit of his creditors as he thought proper. The complainant had no equity to prevent him from so doing ; and I see nothing to impeach the validity of the assignment. Smyth has a legal title, and may be regarded as a *bona fide* holder of the two notes for a valuable consideration in behalf of creditors generally under the trusts of the assignment. The notes being negotiable by endorsement, he may sue upon them in his own name. This is not a case where an equitable set-off can be allowed to interfere with such legal right. The assignee has the legal right ; and there is as strong a natural equity that the whole of the estate of the insolvent should be distributed rateably among the creditors, as that a part of the assets should be first set apart and applied to compensate the particular debt of the complainant. Where the equities are as strong on one side as the other, the legal right must be left to prevail. In *Miller v. The Receiver of the Franklin Bank*, 1 Paige's C. R. 444, a set-off was allowed : but there a clear right to it existed at law when the affairs of the bank were placed in the hands of a receiver and that step could not divest the party of his legal right. I think this case is different ; and, upon no principle, can the complainant have the relief for which his bill seeks.

Bill dismissed, with costs.

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A party who disclaims and shows he has parted with his interest and points out to whom he has disposed of it, need not answer further.

A disclaimer may be sufficient to take away the complainant's right to a further answer, and yet not entitle the party disclaiming to an immediate discharge from the suit.

Where a defendant disclaims, the complainant may bring the suit to a hearing, and if there were probable cause for making such defendant a party, the complainant may have a decree against him and all claiming under him—and this too (as to such disclaiming party) without costs.

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July 22,  
1834.

*Exception.*  
*Disclaimer.*  
*Practice.*  
*Costs.*

An action of ejectment in the Supreme Court, had been brought in the names of the defendants, Robert Manning, and Alfred Crommelin, against the present complainants, Paul Spofford, Thomas Tileston and Henry Raymond, to recover certain undivided parts or shares of a house and lot, known as No. 27 Peck Slip, in the city of New York. Issue was joined and the cause stood noticed for trial, when the complainants filed their bill for an injunction to restrain the proceedings at law; and prayed to be quieted in the possession of the property and that the defendants might be decreed to release all the right and title which they set up or claimed.

The defendant, Alfred Crommelin, put in a general answer and disclaimer, which stated that, being owner of an undivided part of the premises, he did, on the fifth day of April, one thousand eight hundred and thirty-one, for the consideration of seven hundred dollars, grant, bargain, sell and convey to his co-defendant, Robert Manning, all his estate, right, title and interest in the property; and that the defendant, Crommelin, had not since claimed and did not then claim any right, title or interest therein, and, therefore, he disclaimed all right, title and interest in the premises and every part thereof. His answer, then, concluded with a

denial of all combination, and a general traverse in the usual form of an answer.

The complainants excepted to the answer for insufficiency, on the ground of the defendant's not answering particularly all the allegations in the bill. The master allowed the exception; and the matter now came before the court upon an exception to his report.

Mr. Manning, the other defendant, had demurred to a part of the bill, and, to the residue, he had given an answer; and, the court, as will be seen, also passed upon this demurrer.

Mr. *E. Paine*, for the complainant.

Mr. *H. W. Warner* and Mr. *R. Manning*, for the defendants.

THE VICE-CHANCELLOR:—As to the exception:—Is this a proper case for a disclaimer; and has the defendant, Alfred Crommelin, shown sufficient to excuse himself from any further discovery?

This defendant permitted his name to be used as a plaintiff in the action of ejectment; and some of the counts in the pleadings at law are framed upon a right or title in him. So, there was cause for making him a party to the present bill, both as respects the discovery and the relief. It would, consequently, not appear to be a case for a mere simple disclaimer: because the effect of a disclaimer, in cases where it can properly be interposed, (as, where no liability rests upon the party disclaiming, and there can be no use in retaining him as a party to the suit) is to dismiss the bill as to him with costs. But a disclaimer can seldom be put in alone; for, as is observed in *Mittf.* (Edwards' Edit. 388.) although a party defendant may, at the time, have no interest in the matter in question, yet as he may have had an interest which he has parted with, the plaintiff may require an answer sufficient to ascertain whether that is the fact or not, and if the defendant has had an interest which he has parted with, an answer is necessary to enable the plaintiff to make the proper party instead of the defendant disclaim-

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## SPOFFORD and others v. MANNING and another.

A party who disclaims and shows he has parted with his interest and points out to whom he has disposed of it, need not answer further.

A disclaimer may be sufficient to take away the complainant's right to a further answer, and yet not entitle the party disclaiming to an immediate discharge from the suit.

Where a defendant disclaims, the complainant may bring the suit to a hearing, and if there were probable cause for making such defendant a party, the complainant may have a decree against him and all claiming under him—and this too (as to such disclaiming party) without costs.

July 22,  
1834.

*Exception.  
Disclaimer.  
Practice.  
Costs.*

An action of ejectment in the Supreme Court, had been brought in the names of the defendants, Robert Manning, and Alfred Crommelin, against the present complainants, Paul Spofford, Thomas Tileston and Henry Raymond, to recover certain undivided parts or shares of a house and lot, known as No. 27 Peck Slip, in the city of New York. Issue was joined and the cause stood noticed for trial, when the complainants filed their bill for an injunction to restrain the proceedings at law; and prayed to be quieted in the possession of the property and that the defendants might be decreed to release all the right and title which they set up or claimed.

The defendant, Alfred Crommelin, put in a general answer and disclaimer, which stated that, being owner of an undivided part of the premises, he did, on the fifth day of April, one thousand eight hundred and thirty-one, for the consideration of seven hundred dollars, grant, bargain, sell and convey to his co-defendant, Robert Manning, all his estate, right, title and interest in the property; and that the defendant, Crommelin, had not since claimed and did not then claim any right, title or interest therein, and, therefore, he disclaimed all right, title and interest in the premises and every part thereof. His answer, then, concluded with a

denial of all combination, and a general traverse in the usual form of an answer.

The complainants excepted to the answer for insufficiency, on the ground of the defendant's not answering particularly all the allegations in the bill. The master allowed the exception; and the matter now came before the court upon an exception to his report.

Mr. Manning, the other defendant, had demurred to a part of the bill, and, to the residue, he had given an answer; and, the court, as will be seen, also passed upon this demurrer.

Mr. *E. Paine*, for the complainant.

Mr. *H. W. Warner* and Mr. *R. Manning*, for the defendants.

THE VICE-CHANCELLOR:—As to the exception:—Is this a proper case for a disclaimer; and has the defendant, Alfred Crommelin, shown sufficient to excuse himself from any further discovery? January 5, 1835.

This defendant permitted his name to be used as a plaintiff in the action of ejectment; and some of the counts in the pleadings at law are framed upon a right or title in him. So, there was cause for making him a party to the present bill, both as respects the discovery and the relief. It would, consequently, not appear to be a case for a mere simple disclaimer: because the effect of a disclaimer, in cases where it can properly be interposed, (as, where no liability rests upon the party disclaiming, and there can be no use in retaining him as a party to the suit) is to dismiss the bill as to him with costs. But a disclaimer can seldom be put in alone; for, as is observed in Mitf. (Edwards' Edit. 388,) although a party defendant may, at the time, have no interest in the matter in question, yet as he may have had an interest which he has parted with the plaintiff may require

an answer sufficient to

show that is the fact or interest which he has enable the plaintiff defendant disc

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ing. The defendant, in the present case, has not merely disclaimed; he has done more: he has stated, by way of answer, at the same time that, being an owner and interested in the property, he did, on a certain day, sell and convey all his right to the person who is made a co-defendant with him and that he hath not since claimed and doth not now claim to have any interest in the matter in question. Thus, the complainants are furnished with all the necessary information to enable them to proceed with their suit; and they have already, in the other defendant, the proper party against whom they can have all the relief which their bill seeks to obtain. Why then require a further answer from this defendant? For the purpose of relief even against him it is not necessary; and if the object be a discovery, any which he could make would be useless: because his answer could not be read as evidence against his co-defendant.

The case of *Glassington v. Thwaites*, 2 Russ. 458, is referred to as containing the rule that a defendant cannot, by disclaimer, deprive a complainant of the right to a full answer from him, unless it is evident the defendant ought not, after such disclaimer, to be retained as a party. If by this is meant that, in all cases where a defendant may be permitted to disclaim, the bill will be dismissed as to him immediately, I apprehend the rule is laid down too broadly, and that what has fallen from the court in the case cited, does not warrant a rule to such an extent.

A disclaimer may be sufficient to take away the complainant's right to a further answer, and yet not entitle the party disclaiming to an immediate discharge from the suit. Where there is probable cause for making him a party, the complainant may not only be excused from paying him costs, but he may pray a decree against the defendant and all claiming under him since the time of filing the bill; and this is usually granted without costs on either side: *Wyatt's Pract. Reg.* 175. Some of the old books of practice lay it down that the complainant may have such decree by motion or petition: 1 *Jacob's Chancery Practiser*, 301; 1 *Harri-son's Ch. Pr.* 235; while the modern writers evidently consider the cause may be brought to a hearing upon the disclaimer (a replication being unnecessary,) and, if it shall

appear, there is good reason for making the disclaiming party a defendant, the complainant may have the decree before spoken of against him: 1. Newland's Prac. 3d edit. 194; 1 Grant's Prac. 169. I see no objection to the adoption of such a course; and in the case now under consideration, it appears to me that when this cause shall be in readiness for a hearing as to the other defendants, it may, at the same time, be heard as to the defendant Crommelin, upon the bill and his answer and disclaimer; and then, upon the ground of there having been sufficient cause for making him a party, by reason of the use of his name in the action of ejectment, it will be competent for the court, by its decree, to enjoin him, as well as the other defendant, from permitting or making any further use of his name as a plaintiff or from proceeding upon the counts founded upon a supposed right or title in him, he having in fact previously parted with all his interest. Such a decree will effectually answer all the complainants' purposes, so far as respects the disclaiming party. If they shall be entitled to further relief—such as a perpetual injunction or a release to quiet their title and possession, they must ask it against the other defendant in whom the adverse title is now vested. For this purpose, or any other, it is not necessary the defendant Alfred Crommelin should be compelled to answer any further. I am of opinion the answer and disclaimer are sufficient as a pleading in the present case; and, consequently, the exception to the master's report must be allowed, with costs.

There is another branch of this case, as respects the defendant Robert Manning, which is also to be disposed of. He has interposed a demurrer to a part of the bill, while he has answered as to the residue. The demurrer has been taken to facts in all respects similar or substantially the same as in *Leonard v. Crommelin*, 1 Edwards' Rep. 206, and it has brought under discussion like questions. I have looked into this case as presented upon the demurrer, in order to see if there were any distinction in principle; and I am not able to discover upon what ground a conclusion can be formed at variance with that decision. This demurrer cannot be allowed.

The case of *The Attorney General v. Lord Lonsdale*, 1 Vol. II.

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Sim. 105, which was not referred to when *Leonard v. Crommelin* was considered and decided, is now cited and relied upon as an authority to show that the doctrine of election can have no application to that or the present case. I apprehend, however, it will be found to contain no principle opposed to the latter decision. But it is unnecessary, at present, to enter upon this enquiry. The defendant will have all the advantage which a review of the doctrine and former adjudications can afford when the cause shall be heard upon an answer to the whole bill. At present, I think there is enough to require a full answer; and the demurrer must be overruled, with costs.


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CHAMPLIN v. CHAMPLIN, et. al.

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A defendant cannot make his answer a mere demurrer or plea in bar, and thereby avoid answering fully. He may take the same ground of defence in an answer as by a demurrer or plea; but even where he does so (and where no plea or demurrer covers any part) he must answer the whole of the bill. This is a salutary rule and subject to very few exceptions.

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Oct. 8th  
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 Pleadings.  
 Exceptions.  
 Answer.

Exceptions had been taken to a joint answer for insufficiency, which were disallowed by the master—and they now came before the court on exceptions to his report.

The answer professed to be an answer to the whole bill, in so far as the defendants were advised it was material or necessary for them to make answer thereto; and not an answer, demurrer and plea to different parts of the bill. After admitting some matters as stated in the bill, it proceeded: "but these defendants object, by way of answer to the bill, as they are advised and believe and therefore submit to the court that the bill is wholly destitute of equity on its face, and they pray the same advantage of this objection as if the same were stated by way of formal demurrer." In like manner they objected to the bill for multifariousness,

even if it contained equity. And they further objected, in the same manner, that all proper and necessary parties were not before the court. The answer then set up new matter in defence—being certain acts done by the complainant, by which, as alleged, he had parted with his rights and equities; and the defendants then said that they were advised and submitted that the complainant was barred by his own acts of all equity to be relieved in the matter of his bill—and they claimed the like advantage of the objection in this behalf as if these matters had been set up by way of plea.

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*Mr. Hay S. McKay*, in favor of the exceptions.

*Mr. H. W. Warner*, contra.

**THE VICE-CHANCELLOR:**—The defendants, by way of answer and without answering particularly the principal matters of the bill, have taken objections in the nature of a demurrer and set up new matter in the manner of a plea in bar.

By this means the defendants endeavour to avoid giving a full answer to the bill, although they submit to answer it; and upon the exceptions for insufficiency, the question is presented, whether a defendant can, by answer, protect himself from answering fully?

This has been somewhat a vexed question; and the early decisions upon the subject are very contradictory. The cases are collected in a note to *Sweet v. Young*, Ambl. 353, Blunt's ed.; and, however fluctuating formerly, I think it may now be considered a settled rule that if a defendant submits to answer he must answer fully; and cannot, except in very few cases, protect himself, by answer, from answering the whole bill. It has been so held repeatedly by Sir John Leach, V. C.: *Mazarredo v. Maitland*, 3 Mad. C. R. 70; ——— v. *Harrison*, 4 Ib. 252; *Thorpe v. Macauley*, 5 Ib. 231; *Ovey v. Leighton*, 2 Sim. & Stu. 234; and Chancellor Walworth has gone a great way towards establishing it in this court: *Cuyler v. Bogert*, 3 Paige's C. R. 186. The latest writers on pleading and practice in the English Chancery treat it as being now the rule of the court: Lube 325; 1 Newland's

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Ch. Pr. 3 ed. 257. The former states the rule as subject to exceptions only where the discovery might tend to criminate the party making it or render him liable to a penalty or forfeiture which has not been waived: *Curzon v. De la Zouch*, 1. Swanst. 192; *Parkhurst v. Lowten*, 1. Meriv. 391;—or where it might operate as a breach of professional confidence. It would seem, therefore, that in all other cases, if a defendant wishes to avoid the necessity of answering or to protect himself against being compelled to make a discovery, if there are grounds for it apparent on the face of the bill, he must demur—if there are not and he can deny some leading substantive allegation upon which the plaintiff's claim or title is made to rest or if he can bring forward some fact which will be a good bar to the discovery or relief or to any part of the discovery or relief which the bill seeks, then he may plead such denial (for a negative plea may be good) or such affirmative new matter in bar as the case will admit of; and if his plea or demurrer can be supported, he will be effectually protected from answering the whole or such parts of the bill as are covered by them. It may be that a defendant is uncertain whether a demurrer will lie or whether a plea would be effectual or the matter may be such as to render it difficult to put it forward in the shape of a formal and regular plea; and, therefore, he may wish to claim—as the defendants have done in the present case—the same benefit by an answer that he could have by a plea or demurrer. This he is at liberty to do; and he may state in his answer the grounds upon which he means to claim such benefit: but, at the same time, since he is driven to or is under the necessity of answering, he must answer fully the whole or such parts of the bill as he submits to answer. If the answer extend only to a part of the bill, then it must be a perfect answer to such part and the residue must be covered by a plea or demurrer in due form properly pleaded.

It is well understood that the system of equity pleading admits of an answer, plea and demurrer to the same bill: but then they must be to different parts of the bill—the pleader taking care to distinguish the parts to which each pleading applies. The whole of the bill must be met in some

form of pleading, either singly or by the several modes of defence combined: still, they must be regarded as distinct pleadings and each must be made to serve its proper office and purpose and be a perfect pleading in itself. Although a plea in many cases requires an answer to be made to some parts of the bill in order to render it effectual as a bar and by an answer, as before remarked, the defendant may claim to have the benefit of a demurrer or a plea, yet this is very far from confounding pleadings and certainly can give no right to substitute one for another: as for instance, an answer for a demurrer or a plea and to contain no more than such a form of pleading would require, if adopted. To allow of such a departure from the true course of pleading would be inconsistent with the principles upon which the system is founded. It would lead to difficulty in the practice of the court; and I am convinced it is a salutary rule, and which ought to admit of very few exceptions, that when a defendant answers and neither pleads nor demurs, he shall not, by his answer, protect himself from answering fully.

This rule appears to dispose of the question upon the present exceptions. It is not pretended that the defendants have answered those parts of the bill to which the exceptions relate; and as they have not raised the objection by a plea or demurrer in form, I think they must answer further.

The master's report, disallowing the exceptions to the answer, is therefore erroneous, and must be overruled, with costs.

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Where a lease is made, with covenant of renewal or that the buildings shall be paid for under an appraisal, and such appraisal takes place: the amount of it does not become a lien upon the demised property.

Covenants are to be expounded so as to carry into effect the intention of the parties. Their spirit, as well as letter, is to be observed; and altho' a covenantor performs a covenant according to the letter, yet if he violates the spirit and does any act to defeat its intent or use, he is guilty of a breach of it.

If a right to any relief be shown by a bill, a demurrer will be overruled.

W. took a lease from D. and others for 90 years at a rent of \$152 50, with a covenant that lessors would take the buildings at a valuation or grant a new lease for another term of 90 years "upon such terms as the lessors might think proper and as should be approved of by the lessee; and in case the lessee did not approve of the terms, he was to be at liberty to take away the buildings. An appraisal was duly made; D. and others refused to pay the amount and tendered a renewal-lease for another 90 years, but put the annual rent at \$6000. W. filed his bill to compel payment of the appraisal or for a new lease at a fair rental. Demurrer interposed. Although the court suggested that the covenant might possibly turn out to be too indefinite, yet as a remedy at law appeared doubtful and the spirit of the covenant required another lease at a just rent, they overruled the demurrer and required the parties to answer.

October 14, 1834. On the first day of June one thousand eight hundred and fourteen the defendants, Margaret Duffield and others, by an indenture of lease, demised to one Nathaniel Howland a certain parcel of land suitable for a rope walk, situated in Brooklyn, for the term of twenty years, at an annual rent of one hundred and fifty-two dollars and fifty cents; with a mutual covenant contained therein that the buildings then erected or to be erected by the lessee and which might be standing upon the premises at the expiration of the term, namely, on the first day of June one thousand eight hundred and thirty-four, should be appraised by three indifferent freeholders, one of whom was to be chosen by the lessors, another by the lessee and these were to select a third; and the lessors were either to pay the appraised value of the buildings to the lessee or his assigns or grant a new lease for another term of twenty years, upon such terms as the lessors might think proper and as should be approved of by

*Lien.*  
*Covenant.*  
*Lessor and*  
*Lessee.*  
*Practice.*  
*Demurrer.*

the lessee or his assigns. And in case the lessee or his assigns should not approve of the terms so offered by the lessors, then the lessee or his assigns were to have the liberty of removing the buildings.

After setting forth the above facts, the bill went on to say that the lessors likewise owned the fee of other land adjoining or contiguous to the demised premises, which, in consequence of the great rise in real estate generally in Brooklyn within a few years past, was greatly enhanced in value; and that the lessors, wishing to avail themselves of the advantages to be derived from the increased value of real estate there by an immediate sale and under the supposition that the continued location of the rope walk, by a renewal of the lease for a further term, would prevent an advantageous sale of the property, and being determined, at all events and under any circumstances, not to renew the lease but cause the rope walk to be removed did, in the month of April one thousand eight hundred and thirty-one and at several times prior and subsequent thereto, publicly and privately offer portions of the property for sale in city lots under a pledge that the rope walk should be removed at the expiration of the complainant's lease, and accordingly several of the lots were sold upon this assurance to the purchasers. That, in pursuance of such predetermination not to renew the lease, the defendants, the lessors, caused a notice to be served upon the complainant on the first day of March one thousand eight hundred and thirty-four of their having chosen an appraiser on their part to estimate the value of the buildings and requesting the complainant to choose one on his part in conformity with the covenants contained in the lease. That the latter accordingly nominated an appraiser and gave notice thereof; and the two appraisers thereupon appointed a third; and the parties then entered into a submission in writing, under their hands and seals, to stand to, abide and perform the appraisement and valuation to be made by the appraisers. That on the second day of June one thousand eight hundred and thirty-four the appraisers made in writing and delivered to the parties an appraisement and valuation of the buildings at two thousand three hundred and seven dollars. The com-

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plainant then submitted, by his bill, that, as the lessors had previously determined not to renew the lease under any circumstances and had precluded themselves from so doing, by selling lots under an assurance or covenant that the buildings were to be removed at the expiration of the term and as they had voluntarily bound themselves by the submission to abide by the appraisement, they were bound to pay the complainant the two thousand three hundred and seven dollars, but which they had refused to do; and that on the third day of June one thousand eight hundred and thirty-four the lessors gave notice that they declined paying the appraised value of the buildings and tendered to the complainant a new lease of the premises for the term of twenty years at the annual rent of six thousand dollars; that this tender, however, was merely colorable and made in bad faith and was intended, by the grossly exorbitant rent proposed, to preclude the possibility of the complainant's approving or accepting of it. That one year's such rent would be equal to one half of the present value of the demised premises. And the bill prayed that the defendants, the lessors, might be decreed to pay to the complainant the sum of two thousand three hundred and seven dollars with interest from the first day of June one thousand eight hundred and thirty-four and be a lien on the demised premises until paid—or, if it should be considered that the defendants were not bound to pay such appraised value of the buildings, then that it might be referred to a master to ascertain what would be a fair, reasonable and proper rent for a further term of twenty years and that the defendants might be compelled by a decree to execute to the complainant a new lease accordingly; and for further relief.

The defendants demurred to all the discovery and relief sought by the bill; and assigned two causes of demurrer: 1st. That if the complainant had any right or claim of redress, the same was at law and not in this court; and 2nd. A want of equity in the case as made by the bill.

Mr. *H. W. Warner*, in support of the demurrer.

Mr. *G. Brinkerhoff*, for the complainant.

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THE VICE-CHANCELLOR :—It is to be observed that this bill is framed with a double aspect, either to compel payment of the appraisement and establish a lien for the amount upon the premises demised or that the complainant's right to a new lease may be declared upon such terms and at such reasonable rent as the court shall ascertain to be just. January 19,  
1835.

If a right to any relief be shown by the bill, the demurrer must be overruled.

The first objection—that the remedy, if any, is at law—seems applicable to the first branch of the alternative relief prayed for ; and if, according to the legal construction and effect of the covenant and of the agreement or submission to abide by and perform the appraisement, an absolute liability to pay the amount fixed by the appraisers has been created, then a court of law can furnish an adequate and appropriate remedy for enforcing it and the complainant should be left to pursue his remedy there : unless, indeed, there is a lien in equity for the appraised value of the buildings which ought to be enforced against the property—for such a purpose this court might be required to entertain jurisdiction.

This is not a case, however, according to my judgment, in which such a lien can be said to exist, even if an obligation rests upon the defendants at law to pay the money. The contract provides for no such thing in terms ; and it is not a case between vendor and vendee of real estate where a lien for the purchase money is implied.

But with respect to a personal liability to pay for the buildings, the covenant is not an absolute one : for it is in the alternative and would be satisfied by the defendants granting a new lease. In an action at law the complainant would be met by evidence of their having offered such new lease, which the complainant declined, and then, according

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to the letter of the covenant, it is not obligatory upon the defendants to pay for the buildings. Whether a court of law would permit an inquiry into the circumstances under which such offer was made, as set forth in this bill, may be considered very doubtful or if it did entertain this inquiry and the court and jury should become convinced that the offer of a new lease, at six thousand dollars rent, was merely colorable and made in bad faith and not such a lease as the defendants were bound to propose for the plaintiff's acceptance, still the defendants might perhaps insist upon the right to offer other terms, such as a Court of Equity would deem to be fair and reasonable in preference to paying the appraised value of the buildings and thus embarrass if not entirely defeat the action at law. For these reasons I am inclined to think the remedy at law would be, at least, doubtful and difficult; and also that, if there be any remedy, it is in this court where the defendants can be compelled to make their election, either to pay the amount awarded or specifically perform the alternative part of the covenant.

The next enquiry then is, whether there is enough presented by this bill to authorize the court to interfere even upon this ground.

The covenant in the lease is very indefinite in regard to the terms upon which the new lease should be granted. After providing for the mode of ascertaining the value of the buildings, and declaring that the lessors are to pay the appraised value or grant a new lease for twenty years (and so far it is plain and perfectly optional with the lessors) it goes on to say that if they elect to give a new lease, it is to be upon such terms as they may think proper and as may be approved of by the lessee or his assigns, and if the latter should not approve of the terms so offered by the former, he or they are to be at liberty to take away the buildings. Thus, except as to the duration of the new lease and that it was to be upon the same premises, every thing which it should contain as constituting the terms upon which it was to be granted are left open to the agreement of the parties. In making a proposition for this purpose, the complainant insists that the defend-

ants were bound to make a fair and reasonable proposition—a proposition in good faith and with a view of having it accepted and such a one too as the complainant or any person willing to take a lease of the land for twenty years might, with some degree of propriety, accept, and the bill alleges, in substance, that the proposition was not made with any such view, that the defendants had previously determined not to renew the lease on any terms, that the proposed yearly rent was grossly exorbitant and such as they knew could not be accepted and that the proposition was designedly intended to preclude the possibility of the acceptance of a new lease and thereby, at the same time, to avoid the payment of the valuation. I am not prepared to say, in consequence of these allegations in the bill, that there has not been a breach of the covenant.

Covenants are to be expounded so as to carry into effect the intention of the parties. The spirit as well as the letter of the covenant is to be attended to; and although the covenantor performs it according to the letter, yet, if he violates the spirit and does any act to defeat its interest or use, he is guilty of a breach: *Platt on Covenants*, 139. The covenant in question can hardly admit of such a latitude of construction as to authorize the defendants, after ascertaining the value of the buildings, to exercise an arbitrary will upon the subject of the terms of a new lease and thereby prevent its acceptance and throw the opposite party upon the only other alternative of removing his buildings. This would render the covenant nugatory, so far as respects the granting of a new lease, and leave it effectual only for the purpose of permitting the lessee or his assigns to take off the buildings. It is true, the words "upon such terms as the lessors might think proper" are expansive and would seem to leave it very much at their will; but when read, as they must be, in connection with the words "and as might be approved of by the lessee or his assigns" the whole sentence implies that the terms to be offered should be made in good faith—should be such as not to shock the "moral sense"—such as might be taken into consideration and with reference to the value of the property and a due regard to

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the object of a new lease might possibly be acceptable. If a proposition were thus made in a spirit of fairness and the parties should, notwithstanding, be unable to agree, there might be a difficulty still in making a lease; and whether this court can, in such a case, interpose and settle the terms by a reference to a master, I will not now undertake to determine. Perhaps it may turn out that the covenant in this respect is too loose and indefinite to be the subject of interference here, in the way of decreeing a specific performance: *Rutgers v. Hunter*, 6 J. C. R. 220. Still I think good faith and the spirit of the covenant require that, in order to avoid paying for the buildings according to the valuation, the defendants should have made an offer of a new lease at such rent and upon such terms as they, in their own conscience at least, sincerely believed to be just. Any offer not so based, must, in my judgment, be deemed a non-compliance with the spirit and intent of the covenant and insufficient to exonerate them from the payment of the money. As the allegations in the bill (and which stand admitted by the demurrer) go to show that in making the offer, the defendants were actuated by improper motives; that their designs were unjust towards the complainant; not made in good faith or with any idea of its being accepted: but, on the contrary that it was colorable only, and one which they knew could not be accepted, I am far from being certain that the court, under such circumstances, can avoid granting relief to some extent, namely, to the putting of the defendants to their election of either paying for the buildings according to the valuation or of making an offer of a new lease which shall be free from such imputations.

Upon the whole, I think the defendants must answer the bill.

Demurrer overruled, with costs.

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v.

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ROSS v. HEGEMAN.

A trust may result or be implied from a joint advance upon a purchase by two in the name of one. It is not within the statute requiring the trust to be manifested by writing. And the payment of the money after the purchase (by the party claiming the benefit of being a joint purchaser) makes no difference. Plea that the alleged trust was not in writing and that the complainant did not pay part of the purchase money at or before the completion of the purchase, overruled.

Bill for a moiety of premises alleged to have been purchased by the complainant and defendant in common. It alleges that the complainant, John E. Ross, and the defendant, Peter A. Hegeman, who was his brother-in-law, made joint application in the month of August, one thousand eight hundred and twenty-five, to Charles W. Sandford, Esquire, for the purchase of two lots of ground in the Bowery. That in pursuance of such joint application, a joint purchase was made of Mr. Sandford, at four thousand dollars, of which ten per cent. was to be paid down and a bond and mortgage on the lots given for the residue; and, at the time of the purchase, one hundred dollars was paid by the complainant and defendant. That the complainant held the receipt of the defendant for fifty dollars, being one half of the advance (receipt set forth.) That it was agreed the deed should be made to the defendant alone, and he alone execute the mortgage—and the reason of this was that the complainant was, and the defendant was not, married. That Sandford executed a deed to the defendant; and took the defendant's mortgage to secure the balance of the purchase-money, and the defendant received the deed as trustee for the complainant, as owner of one moiety. That, at the time of the execution of the deed or thereabouts, the complainant and defendant paid to Sandford four hundred dollars, including the one hundred dollars already paid. That the defendant gave

October 14,  
1834.

*Statute of  
frauds.  
Trust.  
Joint purchase.*

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~  
ROSS  
v.  
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the complainant a receipt for one hundred and fifty dollars, (set forth,) which, with the fifty dollars before paid, was one half of the ten per cent. or four hundred dollars paid on account of the purchase money, dated September 20, 1825. That the defendant took possession of the two lots as joint owner with the complainant, and received the rents on their joint account. That the complainant paid one half of a year's interest on the mortgage, for which the defendant gave a receipt, dated Oct. 4, 1826, (set forth) and continued to pay the interest, and for which he showed a receipt dated Oct. 10, 1827. That the defendant rendered to the complainant some time back an account, of which a copy was given. That the defendant had possessed himself of the lots, and received the rents ever since the execution of the deed, and still continued to receive the same. That the complainant had often applied to the defendant to account for the rents. Prayer for an account thereof; for a conveyance of one moiety of the lots; and for further relief.

Plea; and, answer. *Plea*: to the whole of the relief and to all the discovery, except the execution of the deed and the payment of any part of the purchase money, at or before the time of such execution by the complainant; that the alleged trust in the bill was not manifested or proved by any writing signed by the defendant; and an averment that the complainant did not pay any part of the purchase money at or before the completion of the purchase. *Answer*: admitting the execution of the conveyance from Sandford to the defendant on the tenth day of September one thousand eight hundred and twenty-five; that the defendant paid the one hundred dollars mentioned in the bill from his own monies: that on the execution of the deed, the defendant alone, from his own monies—and not the defendant and complainant jointly—paid the sum of three hundred dollars to Sandford, mentioned in the bill; that these two sums were all the money paid; admitted that the sum of fifty dollars was paid to the defendant, but it was after payment of the one hundred dollars by the defendant, and not as part of the purchase, and that the sum of fifty dollars was the only sum of those mentioned in the bill which was paid by the complainant before the execution of the deed; and, denial of combination.

Mr. A. L. Robertson, in support of the plea.

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Mr. S. D. Craig, for the complainant.

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THE VICE-CHANCELLOR:—I think the plea might be well pleaded in form, within the rules of good pleading, as recognised and explained by the chancellor, in *Bogardus v. Trinity Church*, 4 Paige's C. R. 178; and if I were as well satisfied of its sufficiency in substance, or its applicability to the case made by the bill, I should, without hesitation, allow it to stand as a bar.

January 13,  
1835.

But it appears to me, the case made by the bill is not within the statute requiring the trust to be manifested by some note or declaration in writing. A trust may result or be implied from a joint advance of money upon a purchase in the name of one; and whether the money is paid by the party claiming the benefit of being a joint purchaser before or after the completion of the purchase would seem to make no difference, provided the payment is clearly shown to be on account and in part of the purchase money. Upon the authority of *Wray v. Steele*, 2 Ves. & B. 388. (and see also *Jeremy's Equity Juris.* 86.) I am of opinion, the present is not a case in which the want of an express declaration of trust in writing can be set up in bar to further discovery and relief. At any rate, I am convinced it is the safest course to overrule the plea, with leave to the defendant to raise the objection in his answer: *Townsend v. Townsend*, 2 Paige's C. R. 415, and 577. The defendant is to put in a full answer and pay the costs within twenty days.



1834.

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 CRAIG  
 v.  
 HONE.

CRAIG v. HONE, *et al.*


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 CLARK v. SAME.
 

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A debtor, against whom judgment creditors were pursuing their remedy, allowed to receive for maintenance a part of the funds in the hands of his father's executors, without the consent of creditors—it appearing that the share which such debtor was entitled to under his father's will would be more than sufficient to satisfy all his creditors.

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October 15,  
 1834.

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 Debtor and  
 Creditor.

The defendant, Henry Hone, was entitled, under the will of John Hone his father, deceased, to a distributive share of the rents and income of certain property devised in trust by the said John Hone. The amount of such share had averaged annually about the sum of seventeen hundred dollars; and about a fifth of it arose out of the rents and income of real estate, while the residue came from the income and produce of the personal property.

Judgments had been obtained against Henry Hone; bills were filed; and injunctions issued, prohibiting the executors and trustees of the estate of the said John Hone from paying over to him or his order any part of the income or produce of the same.

The arrears of the annual income of this share, which had been carried to the credit of Henry Hone, since the filing of the bills, was nineteen hundred and fifty dollars, and the sum of five hundred dollars was his proportion of the rents and income which had since fallen due and a part of which might not have been collected, making the whole of such arrears two thousand four hundred and fifty dollars.

The defendant now presented a petition, setting forth the above facts; and also showing that he had no means of sup-

port, except from the income of his said late father's estate, and had been obliged to borrow money, since the issuing of the injunctions, for his necessary maintenance; that the real estate of which the said John Hone his father died seized, and from which an income was now derived, was worth about the sum of sixty-five thousand dollars, and the residus of such real estate was worth about the sum of one hundred thousand dollars, from which about three hundred dollars of income was derived; and he prayed that the arrears of his proportion in such income might be paid to him or such part thereof as should be deemed just, and that the petitioner might be allowed to take the whole or some just share of the future income of such estate for his support and maintenance, as should be deemed right, or for such other order, &c.

1834.

CHANG  
v.  
HONN.

Mr. M. Hoffman, for the petitioner.

THE VICE-CHANCELLOR:—Aside from the present motion, the will of the late John Hone is now before me upon a demurrer to one of the creditor's bills. There are very nice questions upon its validity: and I cannot decide in relation to it until I have had full time carefully to examine the decision of the court of Errors in the case of *Coster v. Lorillard*. But, in the mean time comes the present petition, for a modification of injunctions so as to allow Mr. Hone to receive for his support a portion of the money in the hands of the executors. I had strong doubts, when this motion was made, whether I could grant the prayer of it without the consent of creditors.

It may be as well to refer to the case of *Hickson v. Aylward*, 3 Molloy's R. 34. A receiver had been appointed over the life estate of the defendant Aylward; and Lord Manners had, on application for a maintenance out of the rents, made an order referring it to a master to inquire what would be a sufficient maintenance to be allowed to the defendant. The master had reported upon the sum. The counsel for the complainant moved that the report should be sent back, arguing that although the receiver was over the whole of the debtor's lands, in which he had an estate for life, and although he was entirely unprovided for otherwise,

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v.

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yet, on principle, no allowance could be made to the debtor out of his property for his support whilst any of his creditors were unsatisfied, except with their consent. The then Lord Chancellor (Hart) said, "was it pointed out to Lord Manners when he made this order in favor of this unfortunate gentleman, that the master could have no means of measuring what should be a sufficient maintenance? This is a case in which much argument might be addressed to the feelings of the judge: but one of the duties of a judge and not the easiest, is to control his feelings. When he can only indulge his pity at the expense of creditors, it is his duty to be hard-hearted. This motion is, however, wrong in point of form. The plaintiff objects to the master's report when he should object to the Chancellor's order. This is no critical, but a substantial distinction. The motion must, therefore, stand over to be properly shaped. If the plaintiff desires it, I shall then discharge Lord Manners' order, for it is a point too clear for hesitation. I have a recollection of having been counsel on appeals in cases like this, in which humanity towards the owner of the estate had prompted the judge to step beyond his jurisdiction. Formerly, there prevailed in the colonies a habit of making a provision for the proprietor, while his creditors were not fully satisfied. The privy council, on appeal, uniformly repudiated that. I remember two cases in which the chancery of the island of Jamaica, in the Duke of Manchester's time, there being large estates and debts of comparatively small amount, decreed such allowances to the owners: but on appeal to the privy council, Sir William Grant said it was impossible to sanction them. Then the master has no other means to judge of sufficiency of maintenance than the court had. I could not sustain such an order, except the creditors consented. The plaintiff's demand is to be sure not on foot of a mortgage; and I was considering at first whether that would make any difference, but I cannot see any. I should be glad to be shown a ground to enable me to decide in favor of the defendant; but it is impossible, except by consent."—It appears that afterwards the creditors consented to allow a maintenance.

Although I cannot but approve of the reasoning in *Hick-*

*son v. Ayhoard*, yet in that case the debtor was a mere tenant for life and his rights did not extend over the capital or into the thing itself; whereas, in the present case, Mr. Hone is entitled to a share of principal monies under his father's will and not of the interest merely for he has a power of willing it away, while his children will have the share should he die without a will. The petitioner's case is not to be looked upon as an insolvent one. The estate he gets from his father is more than enough to pay all his debts. There must be more than three thousand dollars at this time in the hands of the executors, and if the bill which seeks to overturn the trusts of this will, should succeed, then a whole one ninth of the capital is exposed to the creditors (the real estate of the testator is said to be worth one hundred and sixty thousand dollars). Should the will stand, the income is only to be liable to the creditors, after sufficient is allowed for support and maintenance. There is a provision in the Revised Statutes to this effect: (1 R. S. 729, sec. 57.)

I think I am justified in this case in modifying the injunction so far as to allow Mr. Hone to receive, out of the monies in the executors hands, the sum of fifteen hundred dollars. I am further induced to do this from having been told that a part of one of the judgments has been paid and another fully satisfied.

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CLAPP V. ASTOR.

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In general cases of periodical payments becoming due at intervals and not accruing *de die in diem* there can be no apportionment. Annuities, therefore, and dividends from money in the funds are not apportionable. An exception appears in the case of annuities for maintenance of infants and of married women living separate from their husbands. And it does not apply to interest due on bond and mortgage, which may be apportioned, notwithstanding it is expressly made payable at stated periods.

Where it is agreed that a party shall receive all dividends and profit on stock so long as he remains in a certain employment and he quits before any dividend is made, he cannot have any apportionment of any general dividend afterwards made. Profit does not become dividend until so declared by the directors.

The bill in this cause, so far as it is now to be considered, went for an account of the profits or dividends on the shares

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v.

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Novb. 21st.

1834.

Apportion-  
ment.  
Dividend.

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v.

ASTOR.

of capital stock of the American Fur Company. It alleged that in the Month of May one thousand eight hundred and twenty-three a verbal agreement was made between the complainant, Benjamin Clapp, and the defendant, John Jacob Astor, by which the complainant was to enter into the service and to take charge of the business of the defendant—who was the president of the American Fur Company and then about to leave the city of New-York for Europe—at a salary of two thousand dollars per annum; and in consideration that the complainant would give his particular attention to the interests of the defendant in the Fur Company during the time he should be so employed, the complainant should receive to his own use the dividends and profits, and was to sustain the loss, if any, arising from ten shares of the capital stock of the company which belonged to the defendant individually—the par value of each share being three hundred dollars. Also, that the time he was to remain in the service of the defendant was left indefinite, but the agreement in relation to the dividends and profits and the losses on the shares of stock was to continue so long as the complainant remained in the employ of the defendant; and the dividends or profits were to be paid to him whenever the same could be ascertained or the engagement with the defendant should be determined. The bill then alleged that under this agreement he entered into the employment of the defendant and continued in his employ from the month of May one thousand eight hundred and twenty-three until the month of April one thousand eight hundred and twenty-eight; and that the defendant received a large amount of money from the Fur Company as dividends or profits arising from the ten shares of stock.

The defendant, in his answer, gave a different version of the agreement. He stated that being president of the Fur Company and about to leave the United States for Europe he did, as such president and not otherwise, agree with the complainant to retain him in the service of the company as secretary at a salary of two thousand dollars during the time he should continue in the service of the company. He admitted that no definite time was agreed upon; also, that being largely interested in the success of the company

he did further agree, on his own behalf, to allow the complainant the nett profits or dividends upon ten shares belonging to the defendant individually, while it was the understanding that the complainant was to bear the loss and pay interest on the capital or par value of the shares—being three hundred dollars each—and his allowance of profits was to continue so long as he remained in the service of the company under the agreement. The defendant denied that any agreement was made for the complainant's entering into the service of the defendant or that the complainant was to give his particular attention to the defendant's interest in the Fur Company. Nor was he to receive the dividends or profits as long as he remained in the employ of the defendant: for he did not then enter into such employ, but was engaged by the company exclusively.

It appeared in proof that the complainant entered upon the service under the contract in April one thousand eight hundred and twenty-three; and continued therein until the month of April one thousand eight hundred and twenty-four. He then entered into a new contract with the firm of John Jacob Astor and Son to serve them as their agent in China, for a period not exceeding three years, at a salary of five thousand dollars a year and certain perquisites, engaging to devote his time and attention exclusively to the business of such agency; and under this engagement he left the United States for Canton and was absent until the autumn of the year one thousand eight hundred and twenty-five—a period of about eighteen months. On his return to New-York, he resumed his former situation in the service of the company; was re-appointed its secretary; and continued in such service until sometime in the year one thousand eight hundred and twenty-eight. In the meantime, no dividend had been declared upon the stock of the company; nor was any made until the year one thousand eight hundred and thirty, when, upon each share at the par value of three hundred dollars, a dividend or profit of about two hundred and ninety dollars was paid to the shareholders. Ten shares of stock, the profits upon which were claimed by the complainant from one thousand eight hundred and twenty-three to one thousand eight hundred and twenty-eight, stood in his name on

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the books of the company from the eighth day of September one thousand eight hundred and twenty-three to the thirty-first day of August one thousand eight hundred and twenty-seven; and they were then re-transferred to the defendant. The amount of profits at this time was not ascertained; and in making the transfer, there was no express reservation of claim or right to profits by or to the complainant. The evidence was that up to the year one thousand eight hundred and twenty-three, the business of the company had been fluctuating; while, since that period, it had been uniformly prosperous: but what the profits had been each year was not proved.

*Mr. W. M. Price*, for the complainant.

*Mr. D. Lord*, for the defendant.

April 20.  
1835.

**THE VICE-CHANCELLOR:**—The principal difference between the parties is, in regard to the complainant's being retained in the service of the defendant or of the American Fur Company; and also, as to the duration of service. But, whatever may have been the true agreement in this respect, it appears to me that the result, upon the law of the case, must be the same.

The weight of evidence is in favor of the defendant's statement of the agreement, namely, that the complainant entered into the service of the company, and was to be allowed the profits or dividends only while he continued in such service under the agreement. But, supposing the agreement to have been to the effect alleged in the bill, even then it is very doubtful whether the same can be considered as subsisting for any longer period than about one year, that is, to the time of the complainant's departure for Canton. This question then presents itself, whether, as there was no dividend during the time, there can now be an apportionment of the dividend which was afterwards made by the company, and received by the defendant upon the ten shares?

Such an apportionment cannot be made upon any just principle, without an investigation into the affairs of the company, commencing with the year one thousand eight

hundred and twenty-three, in order to ascertain its nett profits or gains in each year, and from year to year to the time the complainant might be entitled to the profits. It is not to be supposed the profits were the same for a period of about seven years, at the end of which time the aggregate of nett profits amounted to nearly one hundred per cent. on the capital of the company. For if so, why were not annual dividends made by the company? The fact of a dividend being so long deferred is, of itself, pretty conclusive evidence to show that the business of the company was so extended as not to allow the actual nett profits to be sooner known; and hence, the difficulty of ascertaining how, at what times or seasons in particular the profits were realized. This may be one reason why courts will not undertake an apportionment in cases of this sort. Another is, that dividends upon stocks or funds are payable periodically out of the profits or earnings of the institution, but how or when they accrue is for the corporate body or association itself to ascertain; and when ascertained and declared it becomes an entire sum due on each share to the stockholder. When, therefore, a contract is made in relation to dividends or profits, as in the present case, it must be deemed to have reference to the dividends or profits to be ascertained and declared by the particular company and not to the growing profits from day to day or month to month to be ascertained upon an investigation by third persons or courts of justice into the accounts and transactions of the company.

The rule in relation to apportionment appears to be well settled. In general cases of periodical payments becoming due at intervals, and not accruing *de die in diem*, there can be no apportionment. Annuities, therefore, and dividends from money in the funds are not apportionable: *Pearly v. Smith*, 3 Atk. 261; *Sherrard v. Sherrard*, Ib. 502; *Wilson v. Harman*, 2 Ves. Senr. 672, and S. C. Ambl. 279; *Rashleigh v. Master*, 3 Bro. C. C. 101. But, interest upon money put out on bond and mortgage, notwithstanding it is expressly made payable half-yearly or quarterly, may be apportioned: for although it is reserved at fixed periods, the same accrues and becomes due *de die in diem* for the forbearance of the principal, and hence there is no difficulty in making

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an apportionment for any given time—every day's interest being the same: *Baxter v. Love*, 13 Ves. 135; *Edwards v. The Countess of Warwick*, 2 P. Wms. 176.

An exception to the general rule has been introduced in the instance of annuities for maintenance of infants and of married women living separate from their husbands; and which, perhaps, may be extended to all cases where it is clearly intended for maintenance: *Hay v. Palmer*, 2 P. Wms. 501; *Howell v. Hanforth*, 2 Black. Rep. 1016. Apportionment in such cases is founded upon the necessity of maintenance so long as the party lives; but if not necessary, as where the annuity to a married woman is not for her separate maintenance, it shall not be apportioned at her death: *Anderson v. Dwyer*, 1 Sch. & Lef. 301.

I am of opinion the present case is within the rule against apportioning dividends; and upon this ground the bill must be dismissed, with costs.

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PALMER v. VAN DOREN.

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Even though a defendant absconds and thereby the object of a suit is defeated, yet a complainant, upon motion, cannot dismiss his bill without costs.

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November 24  
1834.

Practice.  
Complainant  
dismissing  
bill.  
Costs.

A judgment creditor's bill had been filed; and, pending the suit and while fearing a *ne exeat*, the defendant had gone into Kentucky to reside. Some testimony had been taken. Motion by the complainant to dismiss his bill without costs.

Mr. D. Graham, Jr., for the complainant.

Mr. D. E. Wheeler. for the defendant.

THE VICE CHANCELLOR:—The English statute of Anne (4 Anne, ch. 16,) to prevent vexatious suits in courts of

equity, declares, in § 23, that "upon the plaintiff dismissing his own bill or the defendant's dismissing the same for want of prosecution, the plaintiff shall pay to the defendant his full costs to be taxed." These words are copied into our statute concerning costs passed, 12. February, 1787. (1 Greenleaf's Ed. 312, § 16 ;) and it has been retained in all the revisions to the present day—with this addition, however, in the Revised Statutes, (2 R. S. 613, § 1,) "except in those cases where, according to the practice of the court, costs would not be awarded against such complainant upon a decree rendered on hearing the cause."

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After the passing of the statute of Anne, the practice was to bring causes to a hearing on bill and answer, withdrawing the replication wherever necessary, and then have the bill dismissed on paying forty shillings costs: the statute not applying where a cause was brought in the ordinary way to a hearing. The court was obliged to give effect to it only where the plaintiff moved to dismiss his bill before a hearing upon the merits or where the defendant was left to move a dismissal for want of prosecution. This practice was altered by a rule of Lord Hardwicke's, in 1748, (see, Beames' Orders, 450,) and which declares that the court, upon a hearing on bill and answer, is at liberty to order a dismissal to be either with forty shillings costs or with costs to be taxed by a master or without costs, as the court, upon the nature and merits of the case, shall think fit.

But at no time since the statute of Anne, and in no case, save one, has the court felt itself at liberty to permit the plaintiff to dismiss his suit without paying the defendant his costs. In *Fidelle v. Evans*, 1 Bro. C. C. 267, S. C. 1 Cox, 27, (in the year 1783,) it was decided that a bill could not be dismissed without costs, except upon consent. In an *Anonymous* case, (in 1790,) 1 Ves. Jr. 140, it appeared that the suit was for an injunction from taking judgment at law and for delivering up deeds to be cancelled. The plaintiff had applied to the King's Bench for the delivery of the deeds, who had accordingly ordered it. A motion was now made to dismiss without costs. Nobody appeared to oppose. The court, Lord Thurlow, considered it beyond the course of the court to allow the same upon motion. So, in *Dixon* Vol. II.

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v. *Parks*, lb. 402, a motion was made to dismiss the bill without costs, on the ground that some bonds, which were the object of it, had been since found and therefore there was a remedy at law. Lord Thurlow again refused the motion immediately, saying he could not conceive a case in which a plaintiff could dismiss his bill without costs—that to dismiss it with costs was a motion of course, but it could not then be dismissed without consent.

Even the bankruptcy of the defendant pending the suit and where the complainant could come in and establish his claim before the commissioners, forms no exception to the rule: *Rutherford v. Miller*, 2 Anstr. 458; *Monteith v. Taylor*, 9 Ves. 615; and see the cases collected and arranged in 1 Hov. Supp. 112.

Still, we have the case of *Knox v. Brown*, 2 Br. C. C. 186, S. C. 1 Cox, 359. It came before Lord Thurlow in 1787. He there went so far as to permit a bill to be dismissed without costs,—thereby evidently evading the statute.

There, the complainant had become surety for the due performance on the part of the defendant of covenants in a lease; and the latter agreed to assign the lease to the former by way of security. The complainant had to pay one hundred dollars on the defendant's account for arrear of rent, whereupon he filed his bill to compel an assignment: but the defendant surrendered it to his landlords and absconded. The Lord Chancellor, as the report in *Browne* has it, said, "the defendant having destroyed the subject of the suit and absconding, shall not put the plaintiff to dismiss his bill on payment of costs. He, therefore, ought to find security for payment of the costs or the bill to be dismissed without costs." And his lordship directed the counsel to move it in this form, which was afterwards done and granted. Mr. Cox, in his report of the case, says that no one appeared on the last motion to oppose. See also Belt's note to this case. Mr. Beames, in his work on Costs, p. 184, observes upon this case, thus: "It is true, the case before Lord Thurlow was the mode of reaching the object of dismissing without costs, and the order appears to have accordingly been so drawn up: but, it is after all a strong decision and in direct opposition to the statute of Anne. The case of *Knox v.*

*Brown* has not been followed either in England or here ; and Lord Thurlow himself—in the cases before referred to of *Dixon v. Parks*, and the *Anonymous* one—appears not to have ventured upon so strong a measure a second time.

In *Lewis v. Germond*, 1 Paige's C. R. 300, and *Hammersly v. Chapman*, 2 Ib. 372., Chancellor Walworth treats it as a settled rule with us, that a plaintiff, on motion, cannot have an order to dismiss without costs, and that such a practice cannot be allowed so long as the statute contains the provision it does—unless where a complainant files a bill in *autre droit*. In all other cases, he must go to a regular hearing. At law, a plaintiff may, it is true, be permitted to discontinue without costs in special cases : because the statute does not apply to courts of law.

Such a thing appears to be tolerated in the Irish courts. In *Drought v. Robinson*, 1 Beatty, 87, the Lord Chancellor suggested that a motion to dismiss might be made before a hearing where the defendant had become insolvent. I am not, at this moment, aware whether the statute of Anne is in force in Ireland. At any rate, we are guided by our own statute, coupled with the English practice.

The motion must be denied. The complainant can go on with the examination of witnesses, if he thinks proper. The costs of resisting the motion are to abide the event of the suit.

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CLARK  
v.  
BOGARDUS.

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CLARK v. BOGARDUS, collector of the estate of Fisher under special letters.

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A money bond or annuity bond will not be presumed paid until there is a lapse of twenty years non-payment. Nothing short of this period will do, unless there are special circumstances to aid the presumption.

Chancery will relieve an obligor from a bond upon clear evidence of the acts and declarations of a deceased obligee and where they amount to a relinquishment of intention to exact payment.

A gift of a legacy to a debtor will not of itself amount to a release of the debt, provided the testator's intention is left doubtful. There must be evidence clearly expressive of the intention—but it may be got at *afundé*.

Sept. 15.  
1834.

Bond.  
Legacy.  
Legatee in-  
debted to the  
testator.  
Injunction.

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Bill to compel the giving up of a bond ; and, in the meantime, to restrain an action at law brought upon it.

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 CLARK
 v.
 BOGARDUS.

The bond was dated the twenty-sixth day of June one thousand eight hundred ; made by the complainant James B. Clarke in favor of Hannah Fisher ; and conditioned to pay "unto the above mentioned Hannah Fisher or to her certain attorney, executors, administrators or assigns the just and full sum of one hundred pounds New-York money annually during the natural life of the said Hannah Fisher in four equal quarterly payments of twenty-five pounds on each of the first days of the months of February, May, August and November in each year during her said life."

The complainant had married Eleanor, a daughter of Hannah Fisher, who was the widow of George Fisher ; and the latter having died intestate and leaving real estate, Hannah Fisher became entitled to dower. In order to obtain her release of it, the heirs at law agreed to allow her a sum of money for life (which was apportioned amongst them) and to give their separate bonds for their portions ; and the bond now in controversy was given by the complainant for his share. The complainant had made payments upon the bond up to the fifth day of August one thousand eight hundred and thirteen ; and no payment, as the complainant alleged, was afterwards required by Mrs. Fisher and he considered all claim as abandoned. Hannah Fisher died on the twenty-first day of March one thousand eight hundred and twenty-nine ; she left a will dated in the year one thousand eight hundred and ten and in it the wife of the complainant was thus remembered :—"First to raise out of my estate in such manner as they" (her executors) "may deem best, the sum of seven hundred and fifty dollars and to pay the same to my daughter Eleanor as an evidence of my love and affection to her and in case of her death to pay the same to her children in equal parts or to their legal representatives."

On the twenty-seventh day of November one thousand eight hundred and thirty the defendant, Robert Bogardus, was appointed, by the surrogate, collector of the goods, chattels and credits of the said Hannah Fisher ; and in the month of March following, the defendant brought the action of debt against the complainant upon the bond. The latter obtained an injunction restraining the suit ; and a motion to dissolve such injunction now came before the court. An

answer had been filed ; but as the case is reported in order to show the general principles contained in the opinion of the court, a particular reference to such answer is not deemed necessary, especially as the Vice-Chancellor did not consider there were such special circumstances as could take the case out of the ordinary rules.

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CLARK
v.
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Mr. *Sherwood*, for the defendant.

Mr. *S. A. Foote*, for the complainant ; who resisted the motion for a dissolution of the injunction upon two distinct grounds : 1st, the lapse of time—and 2nd, ademption, by the legacy to the complainant's wife.

THE VICE-CHANCELLOR :—With respect to the lapse of *Sept. 23.* time—from the year one thousand eight hundred and thirteen to the death of Mrs. Fisher in one thousand eight hundred and twenty-nine, and during which she suffered the bond to remain without any payment of the annuity :—it is not sufficient of itself to raise the presumption of payment or satisfaction of the bond. Twenty years is the rule in the court of chancery ; and nothing short of this period will do, provided there are no special circumstances to aid the presumption : *Matthews on Pres. Ev. 379.* The same writer also lays it down as a rule that a term less than twenty years will not supply the inference of an annuity's having been discharged or released, unless there is auxiliary evidence to support the presumption and make up the deficiency of time. If twenty years has elapsed, still, where the existence of the annuity has been acknowledged within this period, it will rebut any defence grounded solely on the delay : *1b. 386, 387 ; Cupit v. Jackson, McClell, 495, Wynn v. Williams, 5 Ves. 130.* Lord Mansfield carried the doctrine even further at law, and held, that a jury might presume a bond paid in some cases at the end of eighteen years and even in sixteen years ; while other judges have qualified this, and considered his lordship's not the true rule, unless where aided by circumstances : *Matthews, 380.* Are there, then, such special circumstances in the present case ? I

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see none to warrant the inference of a discharge of the annuity.

There is another 'class of cases, where chancery has relieved an obligor from the payment of his bond, upon clear evidence of the acts and declarations of a deceased obligee, and where they amount to a relinquishment of the debt or to a want of intention to exact payment: as in *Wekett v. Raby*, 2 Br. P. C. 386; *Byrn v. Godfrey*, 4 Ves. 6; *Eden v. Smyth*, 5 Ib. 350. But there is no evidence of any such acts or declarations in the case now before the court.

There is another point to be examined: does the legacy given to Eleanor, the wife of the complainant, amount to a release of the debt upon the annuity bond? According to a true construction of the will, the complainant's marital right would give him this legacy. Then, viewing him as a legatee, does the bequest operate as a relinquishment of the debt or annuity payable by the bond? The rule is laid down by Mr. Roper, as follows: "Where a creditor bequeathed a legacy to his debtor, and either does not give the debt or mentions it in such a manner as to leave his intention doubtful, and, after his death, the securities are found among his papers uncanceled, courts of equity do not consider such legacy as necessarily nor even *prima facie* a release or extinguishment of the debt, but requires evidence clearly expressive of the intention to release the debt. If such intention does not appear clearly expressed or implied on the face of the will, evidence *aliunde* will be admitted:" 2 Roper on Leg. 37, 62. There are but few cases on the subject. The first to be particularly noticed is *Eden v. Smyth*, supra, where extrinsic evidence was admitted, not to explain but to repel the existence of a debt whereof the bonds were *prima facie* evidence; and the conclusion which Lord Loughborough came to upon the evidence was, that the testator meant to give the legacy to his son-in-law beneficially, and that the bonds should not be enforced against him—in other words, that the residue of his estate which was given over did not include the bonds as debts or as being a part of his estate—and decreed the legacy to be paid and the bonds to be given up.

If the evidence of intention to give up or release the debt

is not clear, either from the will or by other proof, the gift of a legacy to the debtor will not of itself amount to a release: 2 Roper, 64. Thus, in *Wilmot v. Woodhouse*, 4 Br. C. C. 286, it was held that suffering a bond to remain uncanceled in the testator's possession, showed he did not mean to relinquish the payment of the money: if he had so intended, he could easily have torn off the seal. Even supposing he had forgotten the bond, there was an absence of intention concerning it, and such absence of intention could not be construed into a release. A gift of a legacy might be so framed as to be a release of a demand, but it must be clearly expressed; and in this case of *Wilmot v. Woodhouse*, the bond was, for want of evidence, held not to be discharged.

The case of *Gould v. Adams*, in the Irish Exchequer, Vern. & Scriv. 258, would appear to be at variance with the preceding case; and its authority is, consequently, doubted by Roper. But when the facts as stated in the report are considered, it will be found consistent with the other decisions. The fact of the testator's having altered his mind and given an annuity of fifty pounds instead of one hundred pounds, as first intended, in consequence of having been compelled to pay the debt for which he was surety, was sufficient evidence of his never having intended that a repayment should be enforced: for, otherwise, he would have suffered the annuity to remain at one hundred pounds.

In the present case, there is no evidence on the face of the will or *aliunde* that Mrs. Fisher intended to give up the annuity to the complainant; and the circumstances are not enough to warrant an inference or presumption to this effect. No act or declaration is shown; while the intention must be proved clearly and affirmatively.

Take an order dissolving the injunction.

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VAN CLEEF v. SICKELS. (a)

In a judgment-creditor's bill against several, the averment must be that the sum due exceeds 100\$ over and above just claims of every sort in favor of any and every party against whom the judgment was rendered. An allegation as to the set-off or claims of one of the debtors only will not be sufficient.

Court can dispense with parties as defendants who are insolvent and where those before the court cannot be benefited by having them brought in.

Where judgment creditors file a bill upon a judgment obtained against several, there will be no necessity for making those of the debtors parties who are insolvent and destitute of property, provided their being so plainly appears upon the bill.

If a judgment creditor files a bill against several, and one denies having property which is not disproved, the bill may have to be dismissed with costs as to him, although it will be retained as to others.

October 14,
1834.

*Debtor and
Creditor.
Parties.*

Judgment creditor's bill filed against George G. Sickels only. The judgment had been obtained in the Supreme Court against Alfred Moore, William Moore, George G. Sickels, Barzilla Smith and Thomas G. Fletcher, upon a promissory note drawn by William Moore and Alfred Moore as joint makers and co-partners, and endorsed by Sickels, Smith and Fletcher as joint dealers or co-partners under the style of George G. Sickels & Co. The process by which the action at law was commenced was served upon William Moore and upon Sickels and Fletcher, the proceedings being against them and Alfred Moore and Barzilla Smith as joint debtors—but the two latter could not be found to be served with the process. An execution upon the judgment was issued to the sheriff of the city and county of New York where all the parties resided, except Barzilla Smith, whose residence the complainant did not know. Upon the writ of *feri facias* was endorsed a direction to the sheriff to levy on the property of William Moore, George G. Sickels and Thomas G. Fletcher, and on the personal property owned

(a) See this case reported on appeal, 5 Paige's C. R. 505.

by William Moore as a partner of Alfred Moore, and also on the personal property of Sickels and Fletcher owned by them as partners with Smith. The sheriff returned the execution *nulla bona*. After setting forth the above facts, the bill went on to say that the whole amount of the judgment with interest was still due and owing to the complainant over and above all "prior" just claims of the defendant Sickels by way of offset or otherwise; and that he had reason to believe and did believe that the said defendant Sickels had equitable interests, things in action and other property of the value of one hundred dollars or more, exclusive of all "prior" just claims thereon which the complainant had been unable to discover and reach by execution on the judgment. It also denied collusion. And then came an excuse for not making William Moore, Alfred Moore, Barzilla Smith and Thomas G. Fletcher parties to the bill, namely, that from the information which the complainant had received and which he believed to be true, and the advice of his counsel, he was fearful that if he made them parties, he would have to pay them costs. The bill prayed discovery and relief against the defendant Sickels in the usual form.

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A demurrer was interposed; and the grounds of it were, that all the persons, against whom the judgment was recovered, were necessary parties and should have been made defendants—especially Alfred Moore and Barzilla Smith—inasmuch as they were jointly liable and yet no legal process was served upon them; and generally, because the complainant had not made such a case by his bill as entitled him to discovery or relief.

Mr. A. D. Logan, for the complainant.

Mr. H. Brewster, for the defendant.

THE VICE-CHANCELLOR:—The bill is defective in one or two particulars—even supposing there is no want of proper parties. It avers the amount of the judgment to be still owing over and above all "prior just claims by way of offset or otherwise." The word *prior* should have been omitted.

January 12,
 1835.

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v.
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ted. There may possibly be claims which have accrued subsequently to the judgment forming a good set-off and reduce the amount below one hundred dollars, and thus take away the right to file a bill in this court. Nor does the expression "still due" obviate the objection. Again, the averment only negatives any claims of the defendant George G. Sickels by way of set-off:—now, some of the other defendants in the judgment may have just claims, and as the object of the bill, requiring an averment of this sort, is to show that the case in point of amount is not beneath the jurisdiction of the court, I consider the averment should show that the sum due exceeds one hundred dollars over and above just claims of every sort in favor of any party against whom the judgment was rendered.

But the material question upon the demurrer is, whether the judgment creditor can exhibit a bill here without making all the debtors in the judgment parties to the suit?

I have heretofore had occasion to decide, upon demurrer to a bill, that all the defendants in a judgment were not necessarily to be made parties to the suit, but that the creditor might select such one or more of them as he could ascertain possessed the means of paying the judgment or some part of it and omit the rest. This, I believe, has often been done in practice, and I should have entertained no doubt of the correctness of the course, were it not for an intimation to the contrary in *Child v. Brace*, 4 Paige's C. R. 309. But, the point, in truth, was not there expressly adjudicated by the chancellor: the objection not having been raised by demurrer or insisted upon in the answers; and his honor has only made the observation that the objection of a want of parties, by omitting some of the joint debtors or defendants in the judgment, would probably be valid if made in proper time. The question, I take it, is still an open one; but the strong inclination, as I believe, of the chancellor's mind serves to admonish me of the propriety of bestowing a little more reflection upon it. It is a matter of considerable importance in practice, and the point should be definitively settled.

The objection to proceeding in this manner against one of a number of defendants in a judgment, seems founded

upon the general rule that where there is a joint or a joint and several liability for a debt, the payment of which is sought to be enforced in equity, the plaintiff must bring each of the debtors or their legal representatives before the court: see *Bland v. Winter*, 1 Sim. & S. 246. The reasons assigned for the rule are, that the debtors are entitled to the assistance of each other in making a defence and in taking accounts, and also to contribution where one pays more than his share of the debt, so that when all are before the court a contribution may be compelled directly and circuitry avoided. But when the reasons for the rule do not exist, it is very properly held not to apply, and a variety of cases are admitted to form exceptions to it: *Madox v. Jackson*, 3 Atk. 406; *Van Reimsdyk v. Kane*, 1 Gallison, 383. In *Madox v. Jackson*, where a bill was filed by the obligee of a bond against one obligor and the representatives of another, omitting the representatives of a third obligor and alleging his dying insolvent, Lord Hardwicke overruled an objection of want of parties. So in *Angerstein v. Clark*, Dick. 738, S. C. 3 Swanst. 147, n., Lord Thurlow considered that the insolvency of one of several co-obligors being stated in the bill, and admitted, was sufficient to dispense with his being brought before the court. Lord Eldon's remarks in *Cockburn v. Thompson*, 16 Ves. 326, are to the same effect. An insolvent obligor may, however, be made a party at the option of the complainant, and will not on that account be entitled to his costs: *Haywood v. Ovey*, 6 Mad. C. R. 113.

In a variety of other cases, the rule has been held not to apply; and as it has been made for the benefit of defendants, it is obvious the court may dispense with its observance when it is manifest that the defendants before the court can have no right to contribution from others or when, from insolvency or other special cause, it is made to appear that they cannot be benefited by having other parties made defendants with them.

It appears to me that creditor's bills, founded upon judgments at law and executions returned unsatisfied against joint debtors, are special cases under our system as now modified and established, which must, from necessity, be excepted from the ordinary rule requiring all joint debtors to

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be made parties to the suit. The equity of these bills, in general, consists not merely in the existing indebtedness, the recovery of a judgment and the issuing and return of an execution unsatisfied—these are facts necessary to be stated in order to show that the creditors pursuit of his legal remedy has proved unavailing. The court of law having exhausted its power in his behalf, he then applies to equity for its more searching and powerful aid; and the ground for the application is, that the debtor possesses property or means of some kind which ought to be applied to the payment of the debt, but which he keeps concealed or refuses to discover and fraudulently withholds from the creditor. From such facts it is that this court acquires jurisdiction to compel a discovery and surrender of the debtor's property in order to have it applied to the satisfaction of the judgment. It is only for this purpose its authority is invoked, and upon this ground it lends its aid to reach such property as a court of law, from its established forms and course of proceeding, could not reach.

There is another important feature in regard to the exercise of this court's jurisdiction: the debt must not only amount to one hundred dollars, but the property of the debtor, when discovered, must likewise exceed that amount in value or the court may be obliged to dismiss the bill with costs: 2 R. S. 173, § 37; and by way of assurance to the court that it has jurisdiction and can take cognizance of the case, certain averments are required respecting the amount due on the judgment and the defendant's having or being entitled to property: Rule 189. These averments are so essential that their omission renders the bill so imperfect as to be good ground for a demurrer: *Mc Elvain v. Willis*, 3 Paige's C. R. 505. The possession and concealment or withholding of property to the amount of at least one hundred dollars is, therefore, a necessary ingredient in the foundation and equity of these bills; and it may apply to one only out of a number of joint debtors by judgment—one may be possessed of property and be disposed at the same time to act fraudulently, whilst his co-defendants may be destitute of any means and entirely innocent of concealment or other fraud. Is not the creditor then in such a case

to be at liberty to exhibit his bill against the fraudulent one?—or must he necessarily implicate the innocent or be deprived of the right to proceed with his suit? How can he, indeed, make the averment which the rule requires so as to bring in those as parties to the bill whose circumstances he is entirely ignorant of or who he has no reason to believe are otherwise than poor and honest? Some of a number of joint debtors may be of this description and, so, there may be no ground for a bill against them. The fraudulent concealment and withholding of property from the creditor may be the act of others, and this being a matter distinct in itself from the joint liability of all the debtors and forming in a great measure the ground of equitable interference, it appears to me the remedy may be pursued against them alone and without regard to the joint liability of those who are not concerned in the acts of which the party filing the bill complains. Still, all the debtors may be made defendants to the bill; and, perhaps, the general allegation or averment that the plaintiff has reason to believe and does believe that the defendants or some or one of them is possessed of or entitled to property, &c. would be sufficient—and yet I apprehend it would be at the hazard of costs, if it should prove to be untrue as to any one of the defendants who should sever in his defence.

If they should put in separate answers, as they may do, and any one should deny the allegation or, in other words, the equity of the bill as respected himself and the complainant should fail to disprove such denial, it might be incumbent upon the court to dismiss the bill as to such defendant with costs, notwithstanding, upon the discovery or proof of property as to another defendant, the court could retain it and decree relief. In case the complainant would be subjected to this consequence in respect to an innocent defendant, although a joint debtor with the rest, then it follows he should have the right to discriminate and proceed against the property of others, without having to bring such innocent one before the court; and this too more especially if the complainant can excuse the omission by an affirmative allegation, similar to the one contained in the present bill, that from the information which he had received and which he

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verily believed to be true the persons omitted as defendants were destitute of property.

For these reasons I must adhere to the opinion which I have heretofore expressed; and overrule the present demurrer, so far as it assigns for cause the non-joinder of the other judgment debtors as parties.

In addition to the points founded upon the want of parties, it was said, upon the argument, that the complainant had not exhausted his legal remedy by such process of execution as was effectual to reach the individual property of all the defendants. The bill shows that two of the defendants could not be found to be served with the rest at the commencement of the suit. The plaintiff was, nevertheless, at liberty to proceed to judgment and execution, although in a modified form as respected any individual property of the two absent defendants. The proceedings were regular and valid—such as the law has prescribed—and for the purposes of a bill here I think the plaintiff must be considered as having fairly exhausted his legal remedy. I have no doubt upon this point.

The formal defects in the bill which I have mentioned as demurrable are not pointed out in the demurrer on the record. They go to the non-joinder of parties and a want of equity in the whole bill. The objections on this score have been taken *ore tenus*, and they are to be allowed: but with liberty to the complainant to amend his bill in this respect. Still, as the written demurrer is overruled, the defendant must pay the costs of it. *Robinson v. Smith*, 3 Paige's C. R. 222; *Garlick v. Strong*, Ib. 440.

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BOGERT, surviving executor of Bogert, deceased v. BOGERT,
and others.

After a witness in an examiner's office has been called and examined by a party, he himself cannot withdraw him, even though he may be interested, but is compelled to let the witness be cross-examined generally in support of the rights of an opposite party. So far as a counsel has got information solely from a person coming to him in the character of client, the rule of secrecy holds: but, no further.

Where a defendant seeks the production of documents or accounts in the complainant's possession, he cannot (unless in the case of requiring them before he can answer and where they are wanted for safe custody) get at them by a motion, but must file a cross bill. Thus, an executor had filed a bill to settle the trusts of a will; B. & wife answered; a replication was filed; and the taking of testimony commenced. B. & wife then applied to have the books and papers left with the examiner for the use of witnesses and counsel. Denied; and the parties were left to a cross-bill.

Although one defendant can move to suppress the testimony of a witness, who was a party, and for whose examination no order was entered under the rule, yet his testimony will hold against the party who had called him and it is also good as to those who have waived objections.

There is no occasion for an executor, who comes to have the trusts of a will defined, to bring testimony for the purpose of invalidating the marriage of a defendant who claims an interest in the estate through it.

It is contrary to the practice of the court to direct the payment of a gross sum by one party to another pending a suit and where there is no sum in court.

Bill by a surviving executor, to have the trust of a will carried into effect and to account and be discharged. Answers had been put in and replications were filed. October 27,
1834.

Four motions now came before the court: 1. By Peter Aymar, a defendant, to suppress the testimony of Mr. Cornelius Bogert, a party in the suit; 2. By the defendants, Artemas Bigelow and Judith his wife, that Cornelius Bogert be compelled to submit to cross-examination and that the surviving executor (complainant) produce and leave with the examiner who was taking the testimony, for the inspection of the witnesses to be examined in the cause and of the counsel for the defendants Artemas Bigelow and Judith his wife, all the books and papers of his deceased testator in his custody or under his control; 3. By the same par-

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Production
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and ac-
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Money dur-
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Counsel as a
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ties, that the said surviving executor pay to the said Bigelow and wife, out of the share coming to the wife, the sum of five thousand dollars; and, 4. A motion by the complainant to name and examine further witnesses.

The first mentioned motion (as to suppressing testimony) was grounded upon an affidavit of no order having been entered for the examination of the witness, subject to just exceptions. The party raising the objection had not attended before the examiner when the witness's direct examination by the counsel for the complainant took place; but he made the objection when the cross-examination by the counsel for Bigelow and wife, who waived all objection, commenced. The complainant was desirous of withdrawing the witness.

In support of the motion to compel Cornelius Bogert to undergo a cross-examination, the complainants showed that he had declined answering questions like the following: "According to your best knowledge and information, did Jacobus Bogert hold any bonds and mortgages at the time of his decease?"; "Did the executors of Jacobus Bogert to the executors of John Bogert a bond and mortgage made by Andrew Stockholm to Jacobus Bogert, and if so, for what consideration?"; "Did Jacobus Bogert hold a bond secured by a mortgage of Daniel Van Voorhis?"; "Are you acquainted with the situation of the house No. 169 Broadway?"; Has the house and lot situated at the corner of Broadway and Cortland Street been sold by the executors of Jacobus Bogert, deceased, and if so, to whom?"; "Will you specify, according to your best knowledge, information and belief, in general terms, of what that estate now consists?"; "When did your agency for the estate of Jacobus Bogert commence and up to what time did it continue?"; &c. &c. And that he so declined, upon the ground of his having been of counsel for the acting executors of Jacobus Bogert, deceased. And, as to the branch of the motion which related to a production of the books and papers, the defendant, Artemas Bigelow, deposed that the complainant had been frequently applied to for the purpose, but neglected and refused and would give no information in relation to them; that no inventory of the estate had been filed with

the surrogate; and an inspection of the books and papers of the estate and the accounts of the executorship were material and necessary to the deponent and his wife, to enable them to obtain the necessary information to defend their rights in the suit; and, as the deponent believed, the said books, papers and accounts were then in the custody of the complainant or his solicitor. The defendants met this motion by showing, they had offered to let the said defendants or their solicitor see the accounts at the office of the complainant's solicitor, although they had declined to furnish copies; and that, the defendant, Bigelow, had declared his intention to hold the complainant personally liable, if he could.

In support of the application for five thousand dollars, the defendants, Bigelow and wife, presented a petition, showing that the petitioner, Judith Bigelow, had a large pecuniary interest in the estate; that, according to their best knowledge, their interest in the said estate, in right of the petitioner Judith, exceeded thirty thousand dollars, over and above all offsets and payments; that they were in need of part of the fund for the support and maintenance of themselves and the children of the said Judith, by her first marriage; that the complainant declared he would make no advance until the final settlement of this suit; and they were apprehensive it would be several years before it was effected. The complainant made an affidavit, showing how he had paid Mr. Bigelow six hundred dollars but a few months past and had lent him smaller sums; and that the greater part of the estate was out on bond and mortgage.

The motion for the examination of further witnesses arose from the circumstance of Mr. Cornelius Bogert's testimony having been objected to and so that the facts contained in it might be supplied; and also because the complainant, finding there were likely to be hostile proceedings, wished to produce proof to shew a former marriage by— (defendant) and a first wife living and thereby throw the burthen upon him of sustaining his second marriage and through which he claimed an interest in the estate.

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Mr. *William H. Elting* and *Mr. Charles Edwards* for the complainant.

Mr. *Benjamin Clark* and Mr. *W. C. Wetmore* for Artemas Bigelow and wife.

*November 3.* THE VICE-CHANCELLOR :—1. As to the motion of Bigelow and wife to cross examine Mr. Bogert; and to have a deposit and an examination of the books and papers of the estate of Jacobus Bogert, deceased. It will be necessary to look at the bill, in order to decide upon the whole of this motion. The object of it is to ascertain and have the court determine upon the nature and extent of the rights of parties interested under the will of Jacobus Bogert. Answers have been put in; replications have been filed; and the examination of Cornelius Bogert as a witness, has commenced. He is a party to the suit, as executor of John Bogert, deceased, who had an interest under the will of Jacobus Bogert, and was one of his executors. It appears he, Mr. Cornelius Bogert, underwent an examination on the part of the complainant, and answered all questions which their counsel put to him, relating to dates and changes of interests from deaths. He was then examined by the guardian *ad litem* of the infant children of Halsey D. Bradford. Afterwards, on a subsequent day, came a cross-examination by the counsel of Bigelow and wife; but before it commenced, the solicitor for Peter Aymar, another defendant, objected to the testimony of Cornelius Bogert, on the ground of his being a party and no order having been entered under the 73d rule for his examination. The objection was noted; but the counsel for Bigelow and wife persisted in pressing on the cross-examination, having made no objection themselves to the witness or the regularity of his examination.

It went on, until the witness declined answering, upon the ground of his having been of counsel as well to the testator Jacobus Bogert in his lifetime, as to his executors during the times they acted in the management of the estate. The counsel for Bigelow and wife had propounded questions as to the nature of the estate of Jacobus Bogert.

Now, as to the first branch of the motion :—the question

of examination. Mr. Bogert's giving testimony without an order was irregular ; and the defendants, Bigelow and wife, might have taken advantage of it. They did not ; and I think it was an irregularity which they, for themselves, might waive. I do not think it rests with the complainant to withdraw the witness. It is not for the party who examines him to object ; and I consider Bigelow and wife had a right to go on and cross-examine him. It appears to be a rule well settled at law, that a witness introduced by a party and sworn generally, although interested to testify against him, may be cross-examined at large, in support of the rights of the opposite party, and the party introducing him cannot question either his competency or credibility : *Jackson, ex dem. Eden v. Varick*, 7 Cow. 288, S. C. on appeal, 2 Wend. 166 ; *Fulton Bank v. Stafford*, Ib. 483. I think the same rule ought to hold good here ; and that, after a witness has been called and examined by a party, he cannot withdraw him even though he may be interested, see *Barden v. Gorman*, 2 Molloy, 376, but is compelled to let him be cross-examined generally by an opponent. Nor do I see how Mr. Bogert can make use of his professional character as a shield against answering such questions as have been put to him. I think he has acted under a mistake of the law. He was not asked as to matter which had been confidentially imparted to him by any one of his clients. So far as a counsel has got information solely from a person coming to him in the character of client, the rule of secrecy holds : but, no further. It does not embrace any information obtained from other quarters or in any other way. I consider Mr. Bogert is bound to answer the questions proposed to him and any others of a like nature. Then, as to a production of the books and papers. This part of the motion must be denied. In general, a party is not compelled to produce testimony to make for his opponent : more especially where defendants ask for it. It is true, there are special cases in which it may be allowed for the purposes of pleading. Thus, if a party is called upon to answer a bill, and wants an inspection of books and papers, before he can fully do so, he can have a sight of them ; or the production can be compelled under certain circumstances. And docu-

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ments may be ordered to be given up for safe custody where there is any apprehension of destruction : *Watts v. Lawrence*, 3 Paige's C. R. 159. Where a defendant seeks the production or discovery of documents in the complainant's possession, the usual course is by filing a cross-bill ; *Mycklethwait v. Moore*, 3 Meriv. 292 ; and Bigelow and wife must do so in this case, provided they require a discovery of the books and papers of the estate of Jacobus Bogert, deceased. This part of the present motion is denied.

2. As to the motion of Mr. Aymar to suppress the testimony of Cornelius Bogert. The application is well founded. He has a right to raise the objection ; and may have an order that Mr. Bogert's deposition shall not be read to his prejudice ; but, from what I have before said, it will have to stand for those parties who have not raised the objection.

3. With regard to the application of the complainant, to examine other witnesses. He is not to be allowed to examine any touching the former, supposed, marriage of Bigelow. There is no occasion for it, at this stage of the cause. But he may take the testimony of other witnesses named who will speak to facts, dates and descents, contained in Mr. Bogert's direct examination.

4. I have now to dispose of the motion of Bigelow and wife : that the complainant, as executor of Jacobus Bogert, deceased, pay them five thousand dollars out of the supposed share of the estate coming to Mrs. Bigelow. This application is founded upon the allegation of her being entitled to thirty thousand dollars. The counter-affidavits show that the two children of Mrs. Bigelow, by her former husband, are supported by some branches of the family ; and the application is, therefore, so far met. But, indeed, an order, to the effect asked for by these defendants, is contrary to the practice of the court. It does not direct payment of money by one party to another pending a suit and where there is no sum in court. It is true, that where there is property in court or subject to its control belonging to a feme covert, it will sometimes grant an order for an allowance out of it for maintenance ; but even this will only be done after a reference, and the report of a master certifying the husband's pecuniary incompetency. But even if the money, in

the present case, were in court, I could not direct such a course to be taken, for the complainant shows that he paid money last summer to these parties, and will be ready to pay them, out of the forthcoming November dividend, a rateable proportion of it. I shall withhold any order upon this motion.

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 SHAW  
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 CHESTER.

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SHAW, Sheriff, &c. v. CHESTER, *et al.*

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If there be no affidavit, denying collusion, attached to an interpleader bill, it is ground of demurrer.

Generally, where a party files an interpleader bill, he must offer and be in readiness to bring the money or thing in dispute into court; and must do so if any injunction is to be granted.

Although a sheriff may meet with embarrassment in relation to the ownership of personal property upon which he is required to levy, or in regard to money coming into his hands under process at law, yet he cannot sustain an interpleader bill:—he has sufficient legal protection in such cases. It is possible there may be circumstances to authorize a bill of interpleader by a sheriff—as where he has not been left to pursue the usual legal course with an execution, but, by following the directions of parties in interest, or by their interference, and without there being any fault, omission or neglect on his part, he has been led into embarrassment or difficulty in relation to conflicting claims from which he can relieve himself in no other way.

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Bill of interpleader, by James Shaw, as sheriff of the city and county of New York, filed against judgment creditors who claimed money made by him under an execution. The circumstances of the case need not be particularly detailed, as the mind of the court was turned to the point whether such a bill in such a case could be filed by a sheriff?

Nov. 29th.  
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*Interplead-  
 er. Sheriff.*

Mr. *D. B. Talmadge*, for the complainant.

Mr. *W. Bonney*, for the defendants John G. Coster and Anthony Dey.

Mr. *D. Lord*, and Mr. *C. C. Young*, for the defendant William W. Chester.

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January 6th,  
1835.

**THE VICE CHANCELLOR:**—The question to be disposed of is not upon the rights of the respective defendants, who may have an interest or claim upon the money in dispute: but, whether the complainant is right in bringing the matter into this court to be litigated by the defendants?

This bill, professing to be a bill of interpleader, is filed by the complainant as sheriff of the city and county of New York—but it wants some of the usual requisites of such a bill. There is no affidavit negating collusion; and this is a ground of objection by demurrer to a bill of interpleader: Mitford, 4 ed. 49; Willis Eq. Pl. 442; and see *Statham v. Hall*, 1 Tur. and Russ. 30. Again; as a general rule, the party filing a bill of interpleader must offer to bring the money or thing in controversy into court; and if an injunction is asked for, it will only be granted on condition of his complying with such offer. But if an injunction is not wanted, it would only seem to be necessary to make the offer in the bill, and be in readiness and in a situation to comply with it whenever the court shall direct the money or other thing to be deposited: *Earl of Thanet v. Paterson*, Barnard. C. R. 250; *Clindennin v. O'Keefe*, 1 Hogan's C. R. 118; and *Mohawk & Hudson Rail Road Co. v. Clute*, 4 Paige's C. R. 391, 392. Here the bill states that the complainant has it not in his power to bring the money into court, having, by a previous arrangement with the defendant, Anthony Dey, deposited the money in bank in their joint names, so that neither of them can draw it out without the consent of the other. He nevertheless offers in the bill to unite with Mr. Dey in withdrawing the money from the bank and depositing it in court whenever directed; and he has made Mr. Dey a party. This may be sufficient, since the court has both parties before it and can control the disposition which they shall unitedly make of the fund.

But aside from these considerations: the question is, whether the present can be a case for an interpleading bill?

It has been well remarked that such bills ought not to be encouraged; and should not be resorted to except in cases where the complainant can, in no other way, protect himself from an unjust litigation in which he has no interest: *Bedell v. Hoffman*, 2 Paige's C. R. 201; and see *Mohawk and Hud-*

*son Rail Road Co. v. Clute*, supra. I think it would be an evidence of great deficiency in our remedial system of laws, and an evil to be deprecated, if every time a sheriff met with difficulty or embarrassment in relation to the ownership of personal property upon which he is required to levy an execution, or whenever money came into his hands under process from courts of law, and there were conflicting claims, it should be necessary for him to resort to a court of chancery for protection and indemnity, and compel the parties to follow him there in order to litigate and settle their rights. The law is not so deficient. It affords to sheriffs the means of protecting themselves in their proceedings under writs of *feri facias*, and renders it unnecessary for them to seek the aid of a Court of Equity.

If a sheriff has reason to apprehend that property pointed out to him does not belong to the defendant in the execution or is not liable to be taken and sold, he may enquire, by means of a jury; and an inquest by them, finding the property not to belong to the defendant, will justify the sheriff in making a return of *nulla bona*, unless the plaintiff gives him a sufficient indemnification, and then he will be bound to proceed upon the execution—an adequate security against loss being all he can require: *Bayley v. Bates*, 8 J. R. 143; *Van Cleeef v. Fleet*, 15 Ib. 147; *Curtis v. Patterson*, 8 Cow. 65. On the other hand, if the jury should find the property to be in the defendant and liable to the execution, and the sheriff proceeds to sell, as he would be bound to do, without a bond or covenant from the plaintiff for his protection, and is afterwards sued or threatened with a suit by a third person claiming the property or its value or proceeds—the inquisition of the sheriff's jury not being conclusive upon the right of property—the court, out of which the execution was issued, will, on application, enlarge the time for making a return, or if the money be in hand and return made, will order it to be retained in court until the right of property can be tried or the sheriff receives a proper indemnification. There are numerous instances where courts of law have thus interfered in England in behalf of sheriffs: *Shaw v. Tunbridge*, 2 W. Black. 1064; *Wells v. Pickman*, 7 T. R. 174; *Thurston v. Thurston*, 1 Taunt. 120; *Mac George v.*

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1634. *Birch*, 4 Ib. 585; *King v. Bridges*, 7 Ib. 294; *Venables v. Wilks*, 4 Bayly Moore, 339; and *Burr v. Freethy*, 1 Bing. 71; the same thing is to be found in the South Carolina Reports, 2 Bay, 67; (*Greenwood v. The Executors of Colcock*;) and it is acknowledged to be the law of our courts in *Bayley v. Bates*, before cited.

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Hence, it appears that courts of law have the power and are fully competent to protect sheriffs in the execution of final process when conflicting claims arise. Such claims can then be put in a course of trial and adjudication without sending the parties into chancery or reducing the sheriff to the necessity of filing a bill for his own protection. I can find but one reported case in the English chancery, where a bill of interpleader has been filed by a sheriff, in relation to money made by him on a *fiery facias*; and where it was clearly held by Lord Eldon that the bill could not be sustained. The case to which I allude is *Slingsby v. Boulton*, 1 Ves. & B. 334. An intimation of Lord Mansfield's (in *Cooper v. Chitty*, 1 Burr. 37,) has been cited, and I find it repeated by our Supreme Court in *Bayley v. Bates*, that a sheriff may put the parties concerned in interest to litigate their right by filing a bill in chancery to oblige them to interplead in order to ascertain to whom the property belonged. But there is no case in England where this has been attempted, except *Slingsby v. Boulton*, and there the course was disapproved.

I am aware of the case of *Nash v. Smith*, 6 Conn. R. 421, where, on the equity side of the Superior Court of law of the state of Connecticut, a bill of interpleader was filed by a constable and sustained. But this was in a court where the two jurisdictions of law and equity are blended, and where the two essentials to such a bill, namely, an affidavit denying collusion, and an offer to bring the money into court, (which are required here and in the English chancery,) are dispensed with, and where it would seem to be a matter of indifference on which side of the court and by what form of proceeding the questions as to the right of property and ownership are raised and decided. Here, however, we have separate jurisdictions, and I deem it of some importance that cases which belong to one should be kept distinct and be

confined to the appropriate tribunal ; and I cannot consent to take the case of *Nash v. Smith*, as a precedent for filing a bill of interpleader under our system of equity jurisdiction and practice.

I do not mean to be understood as saying that in no case can a sheriff be permitted to file such a bill or one partaking of the nature and qualities of an interpleading bill. There may be special cases to warrant his coming into this court : as where he has not been left to pursue the usual legal course with an execution, but, by following directions of parties in interest or by their interference and without any fault, omission or neglect on his part he has been led into embarrassment or difficulty in relation to conflicting claims from which he can relieve himself in no other way. In the present case there are no such special circumstances. With respect to the *fi. fa.* issued by the defendants, Messrs Chester, the complainant had only to pursue the straight forward legal course of taking an inquest, when the adverse claim was set up by Dey as receiver or by the defendant John G. Coster as mortgagee, and have demanded an indemnity bond if the result had shown he was entitled to it. So far from any interference or consent on the part of the Mess. Chester or their attorney, by which the sheriff or his deputy could be diverted from this course, the testimony shows he was repeatedly cautioned against giving up the possession or controul of the property levied upon or its proceeds when sold. There was no objection to a sale through the medium of the auctioneer appointed by the other parties in interest to sell the whole of the property, which was more than sufficient to satisfy the execution, provided so much as would do so could be considered as sold by the sheriff and the proceeds to that amount should come into his hands. This was the clear import of a written notice from the attorney on the twenty-seventh day of February ; and in his subsequent conversations with the complainant and his deputy and previous to the sale they were distinctly informed that the plaintiff would not consent that Mr. Dey should take the property or its proceeds from the possession of the sheriff under the execution, but that the sheriff

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must hold on to the possession and control the proceeds of the sale to that amount; at the same time suggesting that the matter might be tried by a sheriff's jury for his protection. Notwithstanding all this, the sheriff suffered the auctioneer to proceed and sell the whole of the property, without having the exclusive control and possession of any portion of the proceeds—after the sale submitting to the necessity (as the best mode of getting the money out of the hands of the auctioneer) of uniting with Mr. Dey in the receipt of the money and of placing it in bank subject to their joint order. If this course had been concurred in or subsequently adopted by the Chesters, it might, perhaps, have been considered a fitting case for equitable interposition; but not being parties to this arrangement, they chose to put themselves upon their legal rights and proceeded to rule the sheriff to return their execution. He stood out to an attachment; and upon a hearing of the whole matter, the court of law ordered him to return the writ and admit in his return that the money was in his hands subject to the adverse claims. And this he has done. The plaintiffs in the execution, the Messrs. Chester, thereupon required him to pay over the money to them, offering him their bond of indemnity already executed, but to the sufficiency of which no objection was made and no reply given. The sheriff, shortly afterwards, filed the present bill; and although the defendants have answered, the Chesters claim the benefit of the same objections which they could have taken by demurrer—and, as respects them, it appears to me there is no propriety in this bill. In consequence of the return which was made to the writ of *fi. fa.*, the court of law was competent to protect the sheriff by ascertaining the claims upon the money or by requiring he should be indemnified before they would compel him to pay it over. A bond to refund was indeed executed and delivered to him voluntarily, with an offer to make it satisfactory, if it were not so then. He should, therefore, have submitted to the judgment and direction of the court of law or have satisfied himself as to the sufficiency of the bond to save himself harmless and should have paid over the money accor-

dingly. It is no excuse that the identical money was not at his sole command. This was not the fault of the Messrs. Chester, nor any concern of theirs. Besides, the Superior Court had decided that as to them the money was to be considered in the Sheriff's hands, otherwise they would not have ordered him to make a return to this effect. The whole difficulty may be attributed to the circumstance that the sheriff had omitted to obtain the exclusive possession of the money as he ought to have done and this can give him no right to come into this court for protection or relief against the defendants, the Chesters.

In *Burnett v. Anderson*, 1 Mer. 405, it was held that a complainant, who had parted with the property, could not sustain an interpleading bill against different claimants upon an undertaking to pay over the value to the party entitled, nor is the present a case of equitable jurisdiction for a bill in the nature of a bill of interpleader within the principle adverted to by the Chancellor in *The Mohawk & Hudson Rail Road Co. v. Clute*, supra, and the case there cited of *Shotbolt v. Briscow*, Gilbert's Eq. R. 18.

If the parties should now be turned over to their respective legal rights, it appears to me that, upon the law of the case, the sheriff cannot be exposed to any injustice or hardship; and if, in the result as between the sheriff and Mr. Dey and those he may represent, the former shall appear to be entitled to the money now deposited in their joint names, this court can, by a proper bill to be filed, if necessary, decree the money and its accumulations to belong to the sheriff and direct that it be relinquished to him.

The present bill is not calculated for such relief as between these parties; and I consider it cannot be sustained for any purpose. It must be dismissed as to all the defendants and with costs to the Chesters; but as there is no good reason why the defendants, Mess. Dey and Coster, should not have permitted the money to pass into the Sheriff's hands in the first instance, subject to their claims, and as the peculiar situation of the fund has probably induced the sheriff, under the advice of counsel and in good faith, to suppose the present bill proper, I shall, under the circum-

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stances, excuse the sheriff from the payment of their costs of this suit.

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REED v. DARROW.

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Possession or what is tantamount is necessary to the existence of a lien at law.

A landlord's lien, upon the goods of his tenant, is gone immediately they are removed from the demised premises. The statute which allows the former to follow them for a limited period gives no lien.

On the 1st of May, D. owed rent to R.; and removed his goods on the 5th May. The landlord, R., issued a distress warrant on the 16th May; but not being able to find the goods, filed a bill for the tenant to discover where they were and obtained a temporary injunction. Demurrer interposed; and bill dismissed, with costs.

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January,  
1835.

Landlord  
and Tenant.  
Rent.  
Lien.

Question between landlord and tenant. The defendant, Edmund Darrow, on the first day of May one thousand eight hundred and thirty-four, owed rent to the complainant, Stephen Reed. On the fifth day of the same month, the defendant removed his goods from the store which he had hired of the complainant; and on the sixteenth of May, the complainant caused a landlord's warrant to be issued, but could not find the property. The defendant refused to tell where the goods had been deposited. A bill was now filed, setting forth the above facts, averring that the goods were somewhere in the city of New York; and praying for discovery and an injunction.

A demurrer was interposed.

Mr. R. H. Morris, in support of the demurrer.

Mr. James Smith, for the complainant.

January 26. THE VICE-CHANCELLOR :—In a case like the present, the aid of this court can only be required upon the ground of a subsisting lien which cannot otherwise be enforced. The complainant's right to file this bill depends entirely upon the

question whether, as landlord, he retained a lien on the goods of the defendant after they were removed from the demised premises at the end of the term—the removal not having been a clandestine or fraudulent one?

It cannot be denied that the rent was a lien on the goods so long as they remained upon the premises: *Trappan v. Morie*, 18 J. R. 2; *Williams v. Leper*, 3 Burr, 1889; nor, that the landlord had a right to distrain. At common law, this right could only be exercised while the goods were upon the demised premises. The landlord's right to seize them, by way of distress, was gone the moment they were removed: because he had parted with his lien—possession or what is tantamount to possession being necessary to the existence of a lien at law: *Sweet v. Pym*, 1 East, 4; *M'Combie v. Davies*, 7 East, 5.

Has the statute, then, which gives to a landlord the right to follow goods and to seize them off the premises for rent within a certain time after their removal continued such lien to the landlord? I think not. Questions have frequently arisen since the 11 Geo. II, ch. 19, from which our statute is borrowed, between landlords and the assignees of bankrupts, in relation to the landlord's right to rent in preference to other creditors; and in no case—upon the equity of the statute—do I find it intimated that such right would continue after the goods were removed from the demised premises. The case of *Ex parte Plummer*, 1 Atk. 103, occurred shortly after the 11 Geo. II, was passed (which was in 1737—8;) and Lord Hardwicke there observes that, if any goods remain on the premises, they are liable to the distress of the landlord, and he may distrain them for his entire debt, even after assignment or sale by the assignees, if the goods are not removed—thus evidently leaving it to be implied, that if the goods should be removed, the lien would be gone and the landlord left to come in equally with other creditors. It was the rule with Lord Hardwicke that, if the landlord lost his remedy by distress or neglected to use it and suffered the goods to be sold by the assignees, he could have no preference out of the proceeds over other creditors: *Anon.*; and, *Ex parte Descharmes*, 1 Atk. 102, 103. And the subsequent cases of *Ex parte Devine*, before Lord Bathurst in 1776,

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reported in Cooke's Bankr. Laws, 4 ed. 176, and *Bradyll v. Bull*, before the Lords Commissioners and Lord Thurlow in 1785, 1 Bro. C. C. 427, appear to have established the principle that the landlord has no lien upon the goods after they are removed from the premises. I am convinced the law must be so; that the statute did not intend to continue the lien. The landlord may have the right to follow and seize the goods for a limited time without having a lien. It is an extra remedy which the statute has provided for the landlord; but there is no declaration that the goods shall still be bound for the rent, notwithstanding removal or that the distress warrant shall bind from the time it is made out and delivered to the officer; and I consider there can be no enlargement of the right or authority of the landlord by implication. An actual seizure is necessary in order to regain the lien and control of the goods; and unless this can be done within the time prescribed by the statute, the proceeding is at an end, and the remedy by a distress warrant is entirely gone. It appears to be altogether in vain to assimilate the landlord's affidavit and warrant to a judgment and execution at law, and to ask for them the same consideration which would be due to a judicial proceeding in respect to the interference of this court, either to compel a discovery or to aid a creditor who has exhausted his legal remedy. The landlord's proceeding by warrant is not of this character. He does not, by an ineffectual attempt to obtain his money in this way, place himself in the situation of a creditor by judgment with an execution returned unsatisfied. He is still at liberty to pursue a course which will give him a judgment, and must do so before he can say his legal remedy is exhausted.

Now, is this a case for the exercise of the court's authority in order to compel a discovery of the defendant's property?

Chancery never interferes, in behalf of a creditor, before he has obtained judgment or execution at law or acquired a lien, to help him to a lien upon the debtor's property or to restrain the latter from making any disposition of his estate which he may think proper. The cases of *Wiggins v. Arm-*

*strong*, 2 J. C. R. 444, and *Moran v. Dawes*, Hopk. 365, are well founded authorities on the subject.

The bill is to compel the defendants to disclose where the goods, which were removed from the demised premises, were deposited, in order to have them seized by the distress warrant or delivered up and sold under a decree in order to satisfy the rent ; and to restrain the defendant, in the meantime, from making any sale or disposition of the goods. A preliminary injunction was granted to this effect, upon the ground of a subsisting lien under the authority of the cases of *Williams v. Leper*, and *Trappen v. Morie*, without advert- ing to the distinction that in both those cases the goods remained upon the premises, while, in the present suit, they have been removed.

As I am of opinion the removal took from the landlord his lien at common law, and the statute did not continue it to him, and that the issuing of the distress warrant did not of itself create a new lien upon the goods, there is no ground for sustaining the present bill.

The demurrer must be allowed, with costs.

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HUNTER v. DASHWOOD, *et al.*

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Where infant trustees are ordered to convey, they are entitled to their costs.

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A farm had been conveyed to Ludlow Dashwood; and *January 13,* he was to reconvey to the complainant: but died, leaving a widow and infant children. Bill to obtain a conveyance from the latter parties; and decree accordingly (2 R. S. 194.) The question was, whether the children were entitled to their costs? THE VICE-CHANCELLOR decided they were to have these costs (*Ex parte Cant*, 10 Ves. 554.)

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them as security for the re-payment. A few days prior to this, namely, on the fifth of October, the defendants had discounted for Keeler and Rogers the note of one Kellogg, endorsed by them for one thousand and two dollars dated the twenty-eighth day of July preceding, and made payable four months from the date.

Shortly after these transactions and before the note or the bill became due, the firms of Keeler and Mather and Keeler and Rogers failed and became insolvent. After their failure and sometime in the month of November one thousand eight hundred and twenty-five, the defendants, seeking to cover and protect themselves from loss as far as possible, passed away the bill to one Leavit and received from him the full amount and which the defendants applied, in the first place, to the payment of the loan or advance of one thousand dollars made upon the deposit of the bill; and the residue they held and claimed the right to apply as between them and Keeler and Rogers in part payment of the Kellogg-note, which remained unpaid. When the bill came to maturity, the complainants were fixed as endorsers and also were sued by Leavit and compelled to pay him the full amount with costs.

The complainants then brought an action against the present defendants at law, in an action for money had and received, in order to recover back the excess which they had been obliged to pay on the bill beyond the amount for which the defendants had taken it as a security. This action proceeded to judgment in the Supreme Court and there it was determined against the plaintiffs. The report of the case and the opinion of the court will be found in 2 Wendell's R. 391. Having failed there, the complainants filed their bill in this court for relief.

The equitable grounds upon which it is based are these: that the complainants were mere sureties or accommodation endorsers of the draft. That the defendants did not become the absolute owners of the draft by discounting, but received it in pledge and as security for one thousand dollars advanced and to that extent acquired only a qualified right to the draft. That this qualified right, as between the defendants and Keeler and Rogers, did not authorize the de-

cause to be taxed; and that no costs be allowed in this cause to any other party as against another."

Mr. *Charles Graham*, for the complainant.

Mr. *W. H. Harison*, for the guardian *ad litem*.

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GREGORY and another v. BURRELL and another.

Judgment in an action of *assumpsit* in the Supreme Court against the plaintiff upon the merits. Bill now filed by the party failing, which embraced the same parties, was for the same sum and the same evidence was necessary in each. The judgment had never been reversed; and the defendant set it up in his answer as a bar: Bill dismissed—the judgment being conclusive; but as it was a case of hardship, without costs.

In the beginning of the month of October, one thousand eight hundred and twenty-five, the respective mercantile firms of Keeler and Mather and Keeler and Rogers were transacting business, the former at Albany and the latter in the city of New-York. There was one general partnership of the persons composing both firms. On the third day of October, one thousand eight hundred and twenty-five, Keeler and Mather, being pressed for money, drew a bill upon Keeler and Rogers at sixty days for fifteen hundred dollars in favor of the complainants David E. Gregory and Peter Bain, who were merchants and partners in business residing at Albany and which they endorsed as a matter of friendship and for the accommodation of the above firms, upon an understanding that the bill was to be offered for discount at a Bank in Albany. The bill, however, was not so offered, for, without the consent or knowledge of the complainants, it was forwarded by Keeler and Mather to the house of Keeler and Rogers in New-York. On the tenth day of October one thousand eight hundred and twenty-five James Keeler, one of the firm, applied to the defendants to discount the bill. This was declined; but, at the request of Keeler, they made a loan to the firm of Keeler and Rogers, of one thousand dollars upon their check; and the bill was deposited with

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Judgment at  
law a bar for  
same cause of  
suit here.  
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The rule in relation to the conclusiveness of a judgment, rendered by a court of competent jurisdiction, upon the same matter, which is again brought in controversy between the same parties and litigated for the same purpose, is as binding in this court as it is in a court of law: *Orcutt v. Orms*, 3 Paige's C. R. 463. In order to bring a case within the rule, the second suit must be founded upon the same cause of action as the first; and the test of its being the same cause of action is that the same evidence will support both actions, although different in form: *Rice v. King*, 7 J. R. 20.; *Johnson v. Smith*, 8 Ib. 383.

In the case under consideration, the action brought in the Supreme Court was, in form, an action of assumpsit for money had and received. It was between the same parties and for the same sum which is in demand by the present bill.

Since the decision of Lord Mansfield in the often quoted case of *Moses v. Macfarlan*, 2 Burr. 1005, courts of law have constantly regarded the action for money had and received as an equitable action and a substitute, in a great measure, for a bill in equity. It is held to lie whenever a defendant has received money which he is under an obligation, from the ties of natural justice and equity, to refund. The law then implies a debt; and gives the action as being founded upon the equity of the plaintiff's case. If it arise from fraud or imposition practised by the defendant, breach of confidence or trust, extortion or oppression or any other undue advantage taken of the plaintiff's situation and the defendant has by any of these means received money which *ex aquo et bono* he ought to refund, the plaintiff may, at his election, waive the tort and, upon the notion of an implied contract or obligation in law, recover the money in this form of action. Upon these grounds or some of them the complainants brought their action at law; and the present bill rests upon no broader basis. The same facts were given in evidence in support of the action which are now presented for the purpose of upholding the equity of the bill; and the merits of the case were gone into and passed upon by the Supreme Court. And if, upon the facts and under the circumstances of the case,

the plaintiffs were not entitled to recover in an action for money had and received, I do not know upon what principle a bill in equity can be sustained. If we suppose the defendants chargeable with notice of the complainants being accommodation endorsers and that passing the draft to Leavit, under the circumstances and after the known failure of the drawers, can be regarded in the light of a fraud upon the complainants and that by this means the defendants received money to which they were not entitled, then the action for money had and received was calculated to present the question of the plaintiff's right to it. Although the case may not have been put expressly upon this ground, yet it appears, from the decision of the Supreme Court, to have been contended that the peculiar circumstances of the case made the defendants trustees of the plaintiffs for the amount of money in controversy, but the court held there was no trust in favor of the plaintiffs and nothing on the part of the defendants from which an implied promise could be raised to support the action. Here then appears to be a decision broad enough to cover the whole ground of the complainants claim in any view in which it could have been presented. It was made by a court of competent jurisdiction of the plaintiffs own choosing; and the form of the action was of such a nature as to let in the whole equity of the plaintiffs case. The right or wrong of the decision is not now the question. If there were error in the judgment, the plaintiff should have sought to correct it elsewhere. It is not the business, nor is it within the province of this court to review it; and while the judgment remains in force, it is conclusive upon the rights of the parties.

Courts of Equity will sometimes entertain bills and grant relief, notwithstanding a verdict and judgment at law. The cases in which this may be done are adverted to and the principles upon which the court proceeds are clearly stated by Spencer Ch. J. and Van Vechten, Senator, in *King v. Baldwin*, 17 J. R. 384. But there is nothing in those principles to warrant this court in disregarding the judgment at law set up in the present case as a bar.

I must dismiss the bill; yet considering the circumstan-

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ces under which the complainants obtained the money and the hardship of their case, I shall leave each party to bear their own costs of this suit. One of the complainants has died since the cause was submitted: the decree of dismissal may have relation back and be entered as of the fourth Monday of October last.

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DESPLACES v. GORIS, *et. al.* (a)

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Where a written document is the basis of a suit, it will be necessary to prove it, even though the principal defendant may admit the same. Such was the present case; and the complainant had closed his opening argument, when the objection was taken by the defendant's counsel, who also closed his argument. The court considered such objection valid; but allowed the case to stand over for the purpose of giving the complainant time to move in the premises. A motion was made to be now allowed to prove the agreement; which was granted, upon payment of costs. In the meantime, the argument of the cause was suspended.

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February 2.  
 1835.  
 Evidence.  
 Practice.

The complainant and principal defendant, Louis Delestre Goris, had entered into a written agreement, in the French language, relating to an operation in laces; and this agreement formed the basis of the present suit. Goris was charged with having got some of the laces wrongfully into his possession, with a view to act fraudulently in relation to them and contrary to the spirit of the agreement; and the other defendants, Allen and Clute, were attempted to be fixed as intermeddlers and from having had indirect knowledge of the agreement. The bill alleged that this agreement had been executed in two parts in the French language and signed by the respective parties thereto; and, "being translated, is as follows"—*then followed the suggested translation*—and, afterwards, "as by the counterpart of the said agreement in the French language signed by the said defendant Louis

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(a) The order in this case was appealed from: but confirmed by the chancellor.

"Delestre Goris and now in the possession of your orator  
"ready to be produced and proved as this honorable court  
"shall direct, reference being thereunto had, may more  
"fully appear."

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The defendant Louis Delestre Goris, in his answer, admitted he had entered into an agreement which was executed in two parts between the complainant and him; and that the same was generally, as to the facts thereof, fairly stated in the translation inserted in the bill: but for greater certainty the defendant referred to the original thereof. And the defendants Joseph W. Allen and John D. Clute disclaimed, in their answer, all knowledge and notice of the agreement, until they saw the translation in the bill.

The suit was commenced in the month of March one thousand eight hundred and thirty-two; proofs had been closed more than a year and nine months; after forty days, allowed by the ordinary rule of the court to produce witnesses, had or was about to expire, the complainant obtained an *ex parte* order, enlarging the time forty days more; and when such period was about to expire, an application was made by the complainant for further time to produce witnesses—which was also granted. Proofs had been fully gone into on both sides. But the complainant never attempted to produce or prove the original agreement; and he, at last, came to hearing without having in any way done so. The cause had been noticed for several terms; but was not reached until January term, 1835. Then, the counsel for the complainant opened his case, read the whole of the pleadings and testimony, argued his cause at length upon written points: and closed his opening argument. The defendant's counsel (counsel for all of them) next went fully through the case on the part of his clients; and in the course of argument, objected to the sufficiency of proof of the said agreement, referring to *Cox v. Allingham*, Jac. R. 337; and fully concluded the case on his part and left it with the court. The counsel for the complainant then asked leave to prove the agreement. His Honor, the VICE CHANCELLOR, consented to consider the force of the objection; and, on the next morning deemed it well

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taken; but, on application, ordered the further hearing to be adjourned for three weeks, in order to give the plaintiff an opportunity of moving in the premises.

A motion was now made, on the part of the complainant, for leave to prove the agreement either before one of the examiners or before the court upon the further hearing of the cause in such manner and at such time and on such terms as the court might direct and that the same be used as evidence as if proved in the usual way or for such other order, &c.

Mr. *Thatcher T. Payne*, for the complainant.

Mr. *Charles Edwards*, for the defendants.

THE VICE-CHANCELLOR considered there was sufficient in the case of *Cox v. Allingham*, supra, to authorize the proving of the agreement even at this late day. If this were not allowed, the consequence would be the dismissal of the present bill, without a chance of having the merits gone into, while no benefit could result to the defendants.

The following is a copy of the order which was entered.  
 "On reading and filing the affidavit of T. T. P., solicitor for the complainant, on reading and filing the affidavit of C. E. solicitor for the defendants in opposition thereto; and on reference to the pleadings and proofs in this cause; and on hearing counsel for the respective parties (this cause having been ordered by his honor the Vice-Chancellor of the first Circuit at the hearing to stand over for the purpose of allowing this motion to be made) and on motion of T. T. P. solicitor for the complainant. *Ordered*, that the complainant have leave, on giving four days notice thereof to the solicitor for the defendants, to prove before one of the examiners of this court the agreement between the complainant and defendant Louis De'Goris referred to in the pleadings and proofs in this cause and the affidavits produced on this motion and also a

translation thereof, by producing witnesses there-  
to; and that the defendants have leave to cross-  
examine and to produce witnesses on the said ex-  
amination: but that the said cross-examination be  
confined to impeaching the genuineness of the  
said agreement and the correctness of the said  
translation; and that the said agreement, when so  
proved, as herein above directed, be taken and  
used as an exhibit on the hearing of this cause as  
if regularly produced and proved according to the  
ordinary course and practice of this court; and  
also that the complainant pay to the defendant's  
solicitor the taxed costs of opposing this motion."

1834.  
PALMER  
v.  
VAN DOREN.

PALMER v. VAN DOREN.

On an ordinary judgment creditor's bill, where an answer denies property and no proof is  
had to shew any, a *ne exeat* cannot be had.

A judgment creditor's bill; and the answer denied pro- *October 19.*  
perty. Upon petition, the complainant asked for a writ of *1834.*  
*ne exeat.*

*Ne exeat.*

Mr. D. Graham, Jr. for the complainant.

Mr. D. E. Wheeler, for the defendant.

THE VICE-CHANCELLOR :—In order to warrant the issu-  
ing of a writ of *ne exeat republica*, it must not only appear  
that the defendant is about to depart the state, but the court  
is to be satisfied there is a subsisting equitable demand for  
which the suit is instituted: *Mitchell v. Bunch*, 2 Paige's C.  
R. 617, 618, 619.

Here, there is a legal demand: a judgment at law, which  
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 ~~~~~  
 MIX
 v.
 MACKIE.

is sought to be enforced against concealed property or such as could not be taken on execution—as choses in action. To render it an equitable demand or such as this court has jurisdiction of, it must appear that a defendant has equitable interests and things in action exceeding one hundred dollars. This is alleged by the present complainant: but it is positively denied; and there is no evidence before me to rebut this denial. The complainant, therefore, cannot have the writ, which is granted only where it appears that the complainant has an equitable demand or some ground for sustaining his bill in this court and not where his debt or demand is entirely at law.

Motion denied.

MIX v. MACKIE.

ARMSTRONG v. MACKIE.

A cause cannot be put upon the calendar by anticipation. Therefore, where a party noticed a cause, upon the certainty of having a report ready by the time it was called, the court set aside a default obtained upon such notice; but, as the defendant did not move in the matter until after the decree was entered, no costs were given. The latter should, before or when the cause was called, have moved to strike it off the calendar.

February 2,
 1835.
 ~~~~~  
*Practice.*  
*Noticing*  
*cause for*  
*hearing.*

Motion to set aside default for irregularity, with costs. The complainants had filed notes of issue and given notice of hearing for the term: but they were waiting for a master's report which was received after they had given such notice; and when the cause was called, they took a decree by default.

*Mr. S. D. Craig*, moved to set the same aside.

*Mr. Hay S. Mackay*, and *Mr. William Silliman*, opposed.

**THE VICE-CHANCELLOR:—**A party cannot notice a cause for hearing by anticipation. If a suit be waiting for a report, it cannot, merely because such report will be obtained before the cause can be heard, be put upon a calendar for a hearing. Such a thing can certainly not be done except by consent of all parties. The defaults must be set aside; but, inasmuch as the party applying had notice of hearing and saw how the cause stood at a certain number upon the calendar, he should have attended when it was called, and then moved that it be stricken off or placed at the bottom. No costs, therefore, given.

1835.  
PATTERSON  
v.  
ACKERSON.

PATTERSON v. ACKERSON, *et al.*

Although a receipt, not under seal, is expressed to be in full, and therefore presumptive, in favor of payment in full, yet the presumption may be repelled, explained and contradicted by parol testimony. And where a party claims against the face of such receipt, it is for him to prove his prior demands and 'tis not obligatory upon the holder of the receipt to show previous payment independent of the receipt.

The question upon the genuineness of a receipt (in respect to its date) which had been one of the points in controversy —see 1st vol. 101,—was put at rest by the verdict of a jury upon a new trial. The receipt was found to be genuine as related to the date it bore. This was the form of the receipt:

February 3,  
1835.  
Receipt.  
Parol  
testimony.

“Recd. Sept. 6th 1825, from Mr. William Patterson, one hundred and twenty-five dollars in full for rent for Factory up to the twentieth of August last.”

(Signed) “David Cole,  
“Secretary.”

The question now was, upon the effect to be given to the receipt as a piece of evidence: whether it was to be taken in discharge of all previous rent or only in full of rent to the amount of one hundred and twenty-five dollars—which was

1835. for one quarter's rent due on the twentieth day of August preceding.

  
PATTERSON  
v.  
ACKERSON.

In taking the accounts under an order of reference, the master had considered the receipt as only in full for the quarter, and had charged the complainant with the rent of several previous quarters: no other evidence than this receipt having been furnished him. The complainant had taken exceptions to the master's report; and the court was now to decide upon them. These exceptions, so far as they involve any point or principles, will be found referred to in the Vice-Chancellor's opinion.

*Mr. C. F. Grim* and *Mr. S. A. Foote*, for the complainant and in support of the exceptions.

*Mr. S. Sherwood*, contra.

July 6th.

THE VICE-CHANCELLOR:—The receipt for rent due on the twentieth of August, and expressed to be in full, is strongly presumptive evidence of payment of all former arrears; but presumptions arising in this way are, like all other presumptions, liable to be repelled by proof: unless, indeed, the acquittance, for the more recent demand, be under hand and seal, for then it will operate by way of estoppel and exclude all proof to the contrary: *Matthews' Pres. Ev. 398*. A written receipt like the one before the court, not under seal, is always open to explanation and contradiction by parol evidence; and hence, although it may be, *prima facie*, evidence of the previous quarter's having been satisfied, yet it is not conclusive. Adopting this rule as applicable to the present case, the burthen was upon the defendants to account for the circumstance of the receipt being given for one hundred and twenty-five dollars in full for rent to the twentieth day of August, one thousand eight hundred and twenty-five, while arrears were still due. There is no evidence to explain or clear up the difficulty. The whole bent of the testimony, on the part of the defendants, was to show that the payment, specified in the receipt, was made on the eighth day of September, one thousand eight hundred and twenty-three, and that the figures had been altered to make

it read *twenty-five*. But if the payment was made and the receipt given in one thousand eight hundred and twenty-five, as two successive verdicts have found, then there is no satisfactory evidence to falsify the body of the receipt in other respects or to show mistake in the manner of wording it, nor to prove that all the rent previous to the August quarter of one thousand eight hundred and twenty-five had not been paid.

The bill charges that all the rent was paid up to and including the November quarter, of one thousand eight hundred and twenty-five; and this the answer positively denies, as well also as to the payment of any rent subsequent to the month of August, one thousand eight hundred and twenty-three. It is argued that the answer is not disproved. David Cole, however, acknowledges that one hundred and twenty-five dollars was paid at the time the receipt was given; and instead of this being in eighteen hundred and twenty-three, the fact is now conclusively established that it was in one thousand eight hundred and twenty-five, as the receipt imports—and hence, by the combined force of the evidence furnished by the witness and appearing upon the paper, I consider the denials of the answer are disproved.

But it is said, that the receipt being given by an agent is only evidence of so much money paid at the time and not, as against his principals, evidence of a payment in full or of any of the particulars specified in it. The case of *Crary and Morgan v. Turner*, 6 J. R. 51, and other cases mentioned in the notes at the close of that case, to which I have been referred in support of the above proposition, appear to me to have no application—being cases of a special or limited agency where the agent or attorney was considered as acting under a particular authority, and could not bind his principal beyond it. But, here, Cole was the secretary of the company and, clearly, a general agent for the purpose of receiving money and giving a proper acquittance when the payment was in full; and I consider his acknowledgment to that effect is to be taken as binding upon them until the contrary is shown—and that the burthen of proof is cast upon them, provided they would gainsay his act.

1835.

PATTERSON  
v.  
ACKERSON.

1835.

**HARRISON  
v.  
WILLIAMSON**

I apprehend the master has erred in supposing that it was incumbent upon the complainant to make out affirmatively the previous payments independently of and notwithstanding the receipt. The receipt itself was sufficient evidence of the fact; and as the defendants set up claims for rent previously due, they are bound to prove such rent was still in arrear and unpaid. Having failed to do this by satisfactory evidence, the master should not have charged the complainant with any rent which accrued previous to the month of August, one thousand eight hundred and twenty-five. The exceptions to this part of the report must be allowed.

[His honor then went into the matter of exceptions taken to minor points and reserved the question of costs and further directions until an amended report should come in and be confirmed.]

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**HARRISON and another v. WILLIAMSON and others.**

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G. applied to H. and S. in Baltimore to sell him 74 hhds. of molasses on a credit of four months. They declined doing so upon his own credit. He offered to give them a draft upon Mess. H. of N. Y., his consignees. They agreed. G. left Baltimore and went into Virginia. H. and S. wrote to G. saying they were ready to deliver the molasses and considered it at his risk and account. They then commenced shipping it to N. Y. (consigned to Mess. H.) and handed over the bills of lading to G.'s agents. Another letter showed they were using all their exertions to ship off the whole; and they forwarded a draft in blank, on Mess. H., requesting G. to sign and return it. They afterwards wrote for the draft and notified G. of the clearance of all the hogheads. Not hearing from him, they again wrote for the draft. It appeared he had become ill in Virginia; and a friend, at whose house he was, answered their letter at G.'s request, stating that G. would soon go on to Baltimore and then give the draft. They again wrote, urging to have the draft, saying it was all they at present required. G. died insolvent and without having signed the draft. The consignees, Mess. H., who had got the merchandize insured, were applied to by H. and S., the latter sending a bill of parcels, referring to G.'s death and asking Mess. H. to honor the amount at the credit of the four months. A creditor in N. Y. had taken out administration upon G.'s effects, and claimed the proceeds arising from the molasses. *Held* that there had been an absolute sale. And the bill of H. and S., which had been filed to repudiate a sale and to have restoration of the molasses or the proceeds thereof, was dismissed with costs.

**Feb. 10, 11,  
1835.**

**Vendor and  
Vendee.  
Sale or  
Conditional  
Sale?  
Bill of  
exchange.**

A general bill of exchange has not the effect of an assignment of the money (for which it is drawn) in the hands of the drawee.

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This case involved the question of a conditional sale and delivery of merchandize; and how far the vendor was at

liberty to reclaim the goods after he had parted with the possession, where the contract was not complied with by the vendee?

1835.  
HARRISON  
v.  
WILLIAMSON

Sometime in the month of October, one thousand eight hundred and thirty-one, William C. Garrison applied to the complainants, Harrison and Sterritt, merchants of Baltimore, and proposed to buy from them seventy-four hogsheads of molasses, at a certain price, and upon a credit of four months. The complainants were unwilling to make the sale at that length of credit upon Garrison's sole responsibility. Whereupon he offered to give them his draft for the amount at four months on Mess. E. and J. Herrick of New York, to whom he intended to send the property for sale as his factors.

They still declined to make the bargain absolutely binding, until they could obtain information as to the standing of the house of E. and J. Herrick, and could satisfy themselves that their acceptance would be good security. Having, in the course of a few days, satisfied their minds on the subject, they concluded to sell the molasses on the terms proposed. In the meantime, Garrison had left Baltimore and gone into Virginia.

On the seventh day of November, one thousand eight hundred and thirty-one, the complainants addressed a letter to him, saying: "We are ready to deliver the molasses you purchased from us on the 21st ultimo and consider it at your risk and account."

After this, the complainants commenced shipping the molasses; and, by different vessels, shipped the whole for New York, consigned to Mess. E. and J. Herrick, by or before the fourteenth day of December, one thousand eight hundred and thirty-one—and handed over the bills of lading to the agent of Garrison at Baltimore to be forwarded. On the first day of the same December, the complainants enclosed to Garrison a bill of parcels of the molasses and a draft, in blank, on E. and J. Herrick, with a request that he would sign and return it to them; and in their letter they say, "we have used every exertion to obtain a conveyance to New York, and have yet forwarded but 10 hogsheads. Thirty more are engaged to go on deck, but the packet has

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HARRISON

v.

WILLIAMSON

been aground for several days past, and cannot stir. We have the promise of the next vessel, and shall have it off with every despatch in our power."

On the fourteenth day of December, they wrote again to Garrison, saying: "we addressed you on the 1st instant, to which we have not a reply, although the letter contained a draft for your signature on Mess. E. and J. Herrick for the amount of the molasses purchased from us; and in conformity to the bargain, you will much oblige us by attending to the subject, and transmitting us your draft for the amount. We have to advise the clearance of all the molasses for New York, bills of lading for which have been handed over to your friends, Mess. Crawfords."

On the twenty-third day of December, the complainants write to him again, referring to the letter of the first and fourteenth, to which they had had no reply, annexing a second bill of parcels, and repeating the request for the draft by a return of mail. At this time the complainants had heard Garrison was ill at Richmond; and they, therefore, enclosed the letter to a Mr. Morris, to be handed to him. Having received a letter from Mr. Morris, at whose house Garrison was lying sick, which stated Garrison had requested him to say that, in consequence of indisposition, he had not been able to attend to his own affairs, but as soon as he could travel with safety he would go to Baltimore, when he would give the draft required, the complainants, on the twenty-ninth of December, again wrote to Morris, saying they had certainly expected Garrison's answer before that time and were disappointed—begging Morris to communicate to him their request that he would sign the draft forwarded for his signature, and transmit it to them—observing "it is all we require at present, and we cannot conceive the necessity of his waiting until his arrival here. We trust he will not delay this reasonable request."

Garrison died about the same time; and without signing the draft.

The property having been shipped, as before mentioned, to the Mess. Herrick, the complainants, on learning the death of Garrison, apprised them, by a letter of the fourth of January, one thousand eight hundred and thirty-two, of

the fact of his death; and in which they said, that not apprehending such an event, "we obeyed his order in shipping the molasses he purchased from us, and handed over the bills of lading to his friends H. and W. Crawford, to be forwarded to you. The insurance being made by you, as we understand, this course of proceeding rendered it unnecessary for us to correspond with you; but as Mr. Garrison repeatedly assured us that, on his arrival here, he would give us a bill for the amount on you and as this is prevented by his death, we take the liberty of handing you a bill of parcels for the whole he purchased, amounting to \$2327,68, for which we hope you will feel yourselves authorised and at liberty to settle with us at the maturity of the credit. If agreeable, we will thank you to allow us to draw upon you for the amount according to contract."

1834.  
HARRISON  
v.  
WILLIAMSON

On the fourth day of February, one thousand eight hundred and thirty-two, the complainants again wrote to Mess. E. and J. Herrick, urging their claim to be paid by the latter out of the property or the proceeds, upon the principle of carrying Garrison's agreement with them into effect. About this time, however, the defendant, Richard Williamson, had procured letters of administration, from the surrogate of New York, upon the estate of Garrison; and, as such administrator, claimed to be entitled to the goods or the proceeds in the hands of the Mess. Herrick. They could not, therefore, with safety accede to the wishes of the complainants.

Garrison died insolvent. His estate proved insufficient to pay his debts; and hence the complainants had filed their bill, repudiating the sale and praying the possession of the property or to receive the proceeds. On the other hand, the administrator insisted that the title to the property effectually passed and became vested in Garrison, and that the proceeds were assets to be applied in a due course of administration.

The Mess. Herricks had no other interest than as stakeholders; and they deposited the money in court.



1824.

HARRISON

v.

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*Mr. J. L. Mason, for the complainants.**Mr. Gerard, for the defendant Williamson.*

July 20.

**THE VICE-CHANCELLOR:**—The bill places the right of the complainants to relief, upon the ground that the sale and delivery of the molasses were conditional and passed no title to the purchaser until he performed the condition of giving the draft on the Mess. Herrick for the amount; and, as such draft has not been given, that they are at liberty to disavow the contract of sale and look to the Herricks as their agents or trustees.

If, as between the complainants and Garrison, such would be the case, of course the complainants have the same right as against the administrator who had acquired no better title than Garrison had at his death.

The object of the complainants in requiring a draft upon the consignees and factors of the purchaser, as one of the terms or conditions of the sale, undoubtedly was to have security for the amount of the purchase: and yet it is a little remarkable that, while they were making enquiries as to the standing of the house of E. and J. Herrick, they took no measures to ascertain whether such a draft would be accepted—nor did they ask Garrison to furnish them with any evidence of his authority to draw a bill which would bind the drawees to accept. It appears, therefore, to have been taken for granted that such a draft would be honored, from the mere fact of the property having been sent to the intended drawees for sale. These circumstances serve to show, what I think is very apparent from the letters written by the complainants, that they did not expect the draft to be delivered to them previous to their parting with the possession of the property or intend the sale to be conditional and to pass no title, until the draft was actually drawn and placed in their hands. Thus, in the letter of the seventh of November, they give Garrison notice of the bargain being consummated and of their readiness to deliver; and state that the property is from thenceforth at their risk. Here there is no reservation of the benefit of a condition or claim of right to

retain the property until the terms of sale are complied with by the vendee—they are ready to deliver and make no demand of the draft as a condition precedent to such delivery. Nay more: they give him to understand expressly that the property is from thenceforth at his risk and held on his account. How could this unqualified declaration be made unless they considered the title changed and the right of property completely vested in the purchaser? Upon no other ground, it appears to me, could they make the declaration.

The complainants then go on and deliver the property; they ship it according to the orders and the intentions of the purchaser; and they hand over the bills of lading to his agents to be forwarded to his consignees and whereby the latter are enabled to effect insurance upon it as the buyer's property. In all this time there is no mention made or pretence set up of its being a conditional sale or a conditional delivery. Nor, in the letters of the first and fourteenth of December, wherein they call the purchaser's attention to the giving of the draft, do they pretend they were to have had the draft before the molasses was shipped or the possession parted with; and, although in the last of these two letters and in the subsequent one of the twenty-third of December they are particularly urgent for the draft to be signed and transmitted to them, there is not a syllable on the subject of its being a conditional delivery of the property or that they had so considered or should so consider it until furnished with the draft according to the contract. And that such was not the understanding of the contract by either of the parties at the time is, I consider, still further manifested by the subsequent letters written by these complainants. They had heard of Garrison's sickness; he had informed them, through Mr. Morris, that as soon as he was able to travel he would return to Baltimore and give it; and to this they reply complaining of the delay and expressing their disappointment: and yet all they do is to repeat their former request that he would sign the draft and transmit it to them—which was all they then required of him. Now, if by the terms and conditions of the contract or by any circumstance attending the shipment and delivery of the property they had the least idea of the title not having effectually and entirely passed or that they still

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HARRISON  
&  
WILLIAMSON

1835.  
  
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 v.  
 WILLIAMSON

had a right to reclaim it, according to their own understanding of the transaction, it appears to me that, instead of all their persuasion, they would, at once, have said "in withholding from us the draft there is a breach of the condition upon which the property was sold and delivered and unless we receive the draft by return of mail we shall consider the property as belonging to us, although it may have reached its destination and we wish you likewise so to consider it." Nothing, however, of this kind is intimated. Indeed, in the letters written to E. and J. Herrick, after the intelligence of Garrison's death, the complainants do not attempt to disavow the contract or reclaim the property or its proceeds on the ground of any condition unperformed. They rather seek the performance, by asking the Mess. Herrick to accept their draft instead of the one which Garrison was to have drawn or pay over to them the amount at the expiration of the four months credit.

Upon the whole, it seems to me impossible to regard this transaction in the light of a conditional sale and delivery with any right to reclaim the identical goods or proceeds in the hands of the purchaser or volunteers under him, on account of his not having given the draft or bill in payment according to his stipulation.

The true exposition which the complainants, by their own acts, in my opinion, have given of the contract is, that the draft was to serve as a mode of payment and security for the price of the property sold, which they were to be furnished with by the vendee, but that the giving of it was not made a condition of the contract so that the non-performance was to avoid the sale and re-invest the vendors with the right of property in the goods—that the sale became absolute on the seventh day of November—and I have no doubt the understanding of both parties was that the molasses were to be shipped to New-York as fast as possible and thus the delivery be effected. As the vendee had left Baltimore before the vendors had obtained the information which they desired, to enable them to consummate the bargain, it was not expected the vendee could draw his bill for the amount until he should return to Baltimore. In the interim, they were to go on and deliver the property in the manner

stated. Sickness unexpectedly intervened to prevent his return and it occasioned delay. Hence, the letters were written to him, to sign and transmit the draft to the vendors, and which would have been a fulfilment of the contract. They would then have forwarded it to New-York for acceptance. If accepted, the vendors would have had the security they desired for the payment of the goods at the expiration of the four months; and if it had then been dishonored, they would have been entitled to a right of action at once against the drawer. So, if he had refused to give the draft in payment, an action would have lain at law for such refusal and therein they could have recovered; the measure of damages, being the amount for which the draft was to have been given. Hence, the benefit of the stipulation that the vendees should give his draft on his factors; without the precaution, on the part of the vendors, of ascertaining positively it would be accepted. All this is perfectly consistent with other parts of the transaction; and it is this which the parties may be supposed to have had in view.

There is no necessity, then, for considering it a matter of condition in the sale; and the circumstances are opposed to the adoption of such a construction.

Viewing it, as I am constrained to do, in the light of an absolute and unconditional sale and delivery of the property, and there is no principle or rule of law or equity which would authorize this court to interfere. The title effectually passed and vested in the purchaser; the vendor has no lien for the purchase money; and, although it may be a case of great hardship, a Court of Equity cannot relieve. In my view of the case, there is no room for the application of the principles which secure to vendors the right to reclaim the property or its proceeds even as against the vendee. Those principles, as deduced from previously adjudged cases which it is unnecessary now more particularly to advert to, are collected and arranged in 2 Kent's Com. 391; also in the opinion of Justice Washington in *Copland v. Bosquet*, 4 Wash. C. C. R. 588.; and I would also refer to the more recent decisions of our own courts, as establishing more firmly than ever the law upon the subject, in

1835.

HARRISON  
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1835. *Lupin v. Marie*, 6 Wend. R. 77, and *Furniss v. Hone*, 8 Ib. 247—see also, *Buck v. Grimshaw*, 1 Edwards, C. R. 141.  
 HARRISON  
 v.  
 WILLIAMSON

Another point has been made on the part of the complainants: that, although the delivery be deemed absolute, yet the funds which were in the hands of the Mess. Her- rick, to the amount of the price of the goods, were equita- bly assigned by Garrison's undertaking to give the draft. This has proceeded partly upon the notion of compelling a specific performance of the contract; and the cases of *Withy v. Cottle*, 1 Sim. & S. 174; *Lingen v. Simpson*, lb. 600; *Adderly v. Dixon*, lb. 607 have been cited. These cases, however, do not apply. Whenever a court of chancery has interfered to decree a specific performance of a contract in relation to personal property, it has been upon grounds and for reasons which do not exist in the present case. Nor is there any thing in the idea of an equitable assignment of the proceeds of the molasses upon Garrison's undertaking to give the draft. A bill of exchange has not the effect of an assignment of the money (for which it is drawn) in the hands of the drawee, unless, perhaps, where it is drawn upon a particular fund and then, indeed, by the law merchant, it loses its character as a bill of exchange: Chitty on Bills, 55.

There is no foundation upon which to rest the claim set up in the present case; and I must, consequently, dismiss the bill, with costs.

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LEVY and another v. WELSH and others.

W. and C. being indebted to L. and H. on notes for goods sold and for money lent, pro- posed, to mortgage all their present and future stock and goods, in case of a renewal and of a further loan; stating their perfect solvency and the great advantage which would accrue to their business by such loan. L. and H. consented; and the mortgage was made out, which assigned all the goods and stock in trade. W. and C. then owned or which they might at any time before the final payment of the debt own in what- ever store, warehouse or other place the same might be situated: but W. and C. were to keep possession until default. About two months afterwards W. and C. made an assignment to R. of all their goods and stock, in trust for creditors, making R. a pre- ferred creditor; Held, that the mortgage to L. and H. should hold good for so much of the property embraced by the assignment to R. as was in hand or in store at the time the mortgage was given and to such as might have been since purchased and paid for out of its proceeds, but no further; and it was declared that so much of the property and of its avails could be followed.

February 11.  
 1835.

Debtor and  
 Creditor.  
 Fraud.

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The complainants, Myer Levy and Ebenezer Henriques, were the holders of two notes made by the defendants,

James Welsh and John Campbell, as co-partners, drawn in favor of the complainants, one dated New-York 12th March 1831, for one thousand one hundred and ninety-nine dollars and two cents, payable on the twelfth day of September one thousand eight hundred and thirty-one and the other, dated 9th May, 1831, for seven hundred and thirty-two dollars and seventy-eight cents, payable on the ninth day of December in the same year. These notes were given to the complainants for goods sold and delivered to Welsh and Campbell. On the sixth day of June in the same year the latter left with the former goods invoiced by them at seven hundred and thirty-seven dollars and ninety-eight cents, to be sold and the proceeds to be credited on the said two notes.

On the fifteenth day of June one thousand eight hundred and thirty-one the complainants advanced to Welsh and Campbell two thousand dollars, to take up an acceptance falling due on that day; and for which sum Welsh and Campbell gave their three notes, at sixty days, ninety days and four months, for seven hundred and three dollars and sixty-six cents, six hundred and seventy-six dollars and ninety-nine cents and six hundred and seventy-nine dollars and ninety-nine cents; and on the fifth day of August thereafter Welsh and Campbell left with the complainants goods invoiced at six hundred and seventy-five dollars and seventy-three cents, to be sold and the proceeds applied on these notes. On or shortly before the thirteenth day of the same August, Mess. Welsh and Campbell solicited an extension of the three last mentioned notes and also asked for a loan of fifteen hundred dollars, representing that it would enable them to complete their purchases of a stock of goods, saying they were perfectly solvent and would be thereby enabled to do business to great advantage; and they offered, if the complainants would comply with their request and further renew their two notes, falling due on the twelfth day of September and the ninth day of December, for six months, that they would secure the whole by a mortgage or hypothecation of all their goods and stock in trade which they then owned or might thereafter own until the final

1834.

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v  
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payment of the whole debt. The complainants assented to this proposition; and thereupon and on the thirteenth day of August one thousand eight hundred and thirty-one, Welsh and Campbell delivered to them their three notes of that date in favor of the complainants, one for the sum of twelve hundred and five dollars and thirteen cents payable on the first day of January then next, another payable on the first day of February for twelve hundred and twelve dollars and nineteen cents and a third for twelve hundred and eighteen dollars and fifty-seven cents payable on the first day of March, (being the amount of the three notes hereinbefore mentioned dated the 15th of June 1831,) and also of the said sum of fifteen hundred dollars loaned with interest until the maturity of the notes. The complainants delivered up the old notes and advanced the sum of fifteen hundred dollars and received thereupon a mortgage or hypothecation of goods. This document recited the indebtedness; and thereby all the goods, stock in trade &c. in the store of Welsh and Campbell, No. 80, Chartres Street, New Orleans, which they then owned or which they might at any time before the final payment of the said debt own in whatever store, warehouse or other place they might be situate, were mortgaged to the complainants. Possession was not to be taken until default was made in payment of some one of the notes; but upon the first default the complainants had power to enter and take possession of the mortgaged property and sell the same and apply the proceeds to the payment of the notes due and also those to become due, making a discount of the interest for the time they had to run. In pursuance of the agreement, the complainants renewed the note falling due on the twelfth day of September one thousand eight hundred and thirty-one for six months. The complainants had been informed by Welsh and Campbell that, at the date of the mortgage, they had a large quantity of goods in New-Orleans and also in the city of New-York.

Shortly after the first day of October one thousand eight hundred and thirty-one, the complainants were informed that, by an instrument dated the first day of October Welsh

and Campbell assigned all their goods and stock in trade in the store in Chartres Street or elsewhere to the defendant Robert Rutherford, in trust to pay certain creditors named in a certain schedule A. thereto annexed, amounting to eighteen thousand dollars, and in the next place to pay the creditors named in a schedule B. exceeding in amount thirteen thousand dollars. The complainants were put down in schedule A. for fifteen hundred dollars and in schedule B. for four thousand one hundred and nine dollars and sixty-six cents. Rutherford claimed to be a preferred creditor to the amount of fifteen hundred dollars.

The above facts appeared in the bill ; the prayer of which was, that Welsh and Campbell, and Rutherford, might account for, and deliver up to the complainants, all the goods and merchandize which Welsh and Campbell owned at the date of the mortgage or which they might at any time since have owned, and that the goods received by Rutherford as aforesaid, and those left with the complainants as aforesaid, might be sold, and the proceeds applied to the payment of their debt with interest and costs. Also, for further relief; and for an injunction.

The defendants, James Welsh, John Campbell and John Rutherford, filed a joint and several answer. And after admitting the leading facts before set forth, the defendants, Welsh and Campbell, admitted that they did not inform the complainants of the assignment to Rutherford until the seventh day of October. That having become unable to pay their debts, and being desirous of appropriating their property to the payment thereof, and to protect some claims which they considered of a higher description, they executed, on the first day of October, one thousand eight hundred and thirty-one, an assignment of their property. They all alleged that the assignment was made in good faith: but Welsh and Campbell admitted that it was intended to defeat the said mortgage, they being satisfied that they had done wrong in executing it without having disclosed the fact to their other creditors. Rutherford denied all knowledge of the mortgage until after the assignment was executed; and he insisted that the mortgage was void as against him and the other creditors, and also, that possession of the goods had

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never been delivered to the complainants. The defendants admitted that the assignment professed to pass all the goods of Welsh and Campbell, wherever the same were situated, and amongst others, those in Chartres street, New-Orleans. That the goods mentioned in the mortgage were much changed and altered before the assignment, some having been sold and new ones added, but, with this exception, the goods assigned were the same as those mentioned in the mortgage. Rutherford admitted that he claimed all the goods of Welsh and Campbell, including those deposited with the complainants for sale; he claimed to have the same delivered up to him; and he admitted his having demanded possession thereof of the complainants, and having claimed an account of those sold. The defendants denied that the goods, left with the complainants for sale, were invoiced too high, or that any loss ought to be suffered on them. They admitted that the goods assigned were insufficient to pay the debts; that no notice of the said mortgage was given to Rutherford until the seventh of October; that no notice thereof was given to any other creditor of Welsh and Campbell's, nor to their agent in New-Orleans, but the execution of the said mortgage was studiously kept a secret. That Rutherford, subsequent to the sale thereof, sold goods to Welsh and Campbell, which were sent to New-Orleans, and which he would not have done if he had known of the mortgage—and such also was the case with other creditors. Rutherford admitted he had received from New-Orleans the stock in trade of Welsh and Campbell. The defendants admitted that the note of Welsh and Campbell, which fell due on the first day of January, one thousand eight hundred and thirty-two, remained unpaid, and that the complainants had applied to be put into possession of the goods of Welsh and Campbell for payment of their debt; also, that Rutherford claimed the property and would have sold the same and distributed the proceeds according to the assignment, if he had not been enjoined. A copy of the assignment was annexed to the answer.

In the month of March, one thousand eight hundred and thirty-two, an order was entered for the sale of the goods in

the hands of Rutherford, and for payment of the proceeds into court.

Replications were filed; and proofs were gone into: but it is deemed unnecessary to set forth the testimony—the leading charges in the bill were made out.

*Mr. F. B. Cutting*, for the complainants.

*Mr. W. P. Hawes*, for the defendants.

**THE VICE-CHANCELLOR:**—The mortgage executed by the complainants and under which they claim, is, *prima facie*, fraudulent and void as against creditors: the execution of it not having been accompanied by a delivery of the possession of the goods. It is competent, however, for the complainants to repel this presumption by proof of consideration, and the *bona fides* of the transaction. The burthen of proof was upon them; and I think they have succeeded in shewing that the mortgage was founded upon a good and valuable consideration, namely, an advance of money and a renewal and forbearance of notes—as well as that their motives were fair and honest. 27th July.

It was consistent with the object and intention of the parties at the time, that the goods should remain in the possession of Welsh and Campbell. They held out the expectation of being able to go on with their business and pay their debts. In this, however, they failed; and then they made the assignment to Rutherford: but it was before the mortgage had become forfeited according to the condition and before the complainants could enter and take possession of the property. It is very different from the cases of *Divver v. M'Laughlin*, 2 Wend. 596, and *M'Lachlan v. Wright*, 3 Wend. 348, where the mortgagors remained in possession an unreasonable length of time, exercised acts of ownership long after the mortgages were forfeited, and where, from circumstances, it might easily be inferred the mortgages were intended as mere cover, and made for dishonest purposes. No such circumstances appear in the present case.

Although I consider the complainants' mortgage not liable to be entirely destroyed, yet I am not satisfied that it can be

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allowed as effectual beyond the goods which the mortgagors had in store or on hand at the time of giving it. The purport of it is, to cover all they might subsequently acquire or have on hand. If this effect were given to it, great injustice might be done to those who sold them goods on credit without any notice of the existence of such an incumbrance. A mortgage in this way might be productive of, the grossest fraud. It is in proof in this cause that the defendant, Rutherford, sold to Welsh and Campbell, goods on credit, and lent them money after the mortgage was given, and without knowing of its existence. I shall, therefore, restrict the operation of this mortgage to so much of the property, embraced by the assignment to Rutherford, as was on hand or in store at the time the mortgage was given and to such as may have been since purchased and paid for out of its proceeds.

The goods which the mortgagors owned at the time and which are included in the mortgage and the produce of those specific goods invested in others may be followed: *Bucknall v. Roiston*, Prec. in Ch. 285; and the present mortgage is not to be effectual beyond this.

An account must be taken of these goods; and the complainants are entitled to have them applied to the payment of the notes for which the mortgage was given as a security—while any surplus will belong to Rutherford, the assignee, to be held by him under the trusts of the assignment.

The complainants will be entitled to their costs of this suit out of the fund arising from the mortgaged goods: but not against the defendant Rutherford personally.

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BYRNE

v.

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BYRNE v. ROMAINE.


Acts of part performance of a parol agreement for a new lease, will not take such agreement out of the statute of frauds, unless they are solely applicable to the parol agreement. Therefore, repairs by a tenant under his old lease to a considerable extent, upon the idea, in his own mind, of getting a new lease, formed no consideration for a promise to give a new lease.

Where a bill sets up one agreement and the answer denied it and sets up another, the bill must be dismissed, with costs; but without prejudice to another bill to obtain performance of the agreement admitted in the answer.

Bill for specific performance of a promise to grant an additional term of ten years of premises in the city of New-York. The bill stated that the defendant leased the premises in question to the complainant, by a lease dated the fourteenth day of January one thousand eight hundred and twenty-eight for ten years at a rent of four hundred and eighty dollars; he, the complainant intending to improve them at an expense of about three hundred and fifty dollars. That on commencing the repairs, the building was found so old and decayed that the complainant desisted—the expense being greater than such a short lease would warrant. That the complainant and defendant finally agreed that a new lease should be granted by the defendant at an increased rent, for the ten last years, of two per cent on the rent in order to pay the taxes; and that, induced by this, the complainant, at an expense of about fifteen hundred dollars, went on and completed the repairs to the satisfaction of the defendant and when applied to for a new lease of twenty years as promised, the defendant replied, “I have no idea to part with property in that way and you may be very thankful if I give you a lease for fifteen years.” That the complainant, about the ninth day of July one thousand eight hundred and twenty-nine, made a formal offer to surrender his lease of ten years and required a lease of twenty years, stating the terms of the agreement; and to which the de-

Feb. 17,  
1835.

*Statute of  
frauds.  
Parol  
agreement.  
Part perfor-  
mance.*

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defendant replied, "I totally deny it;" and again, on its being repeated, he said "I know nothing about it." That this was in the complainant's office; and he left the defendant declaring he would enforce his rights; also, that within an hour afterwards the complainant received a letter from the defendant of which the following is a copy:

"Sir,

"I am ready and willing to extend your lease of my house in William Street for ten years longer, upon your giving me rent at the rate of six hundred dollars per annum duly secured. If you accept the offer, let me know without delay. Ninth July, 1829.

S. B. Romaine."

The defendant, in his answer, set up the statute of frauds. He denied the agreement for a new lease as alleged in the bill; and his own propositions as to such new lease varied from what the complainant had there stated. Nor did the proofs, satisfactorily, make out the complainant's case.

Mr. *D. Selden* and Mr. *W. Mulock* for the complainant.

Mr. *Griffin*, for the defendant.

*September 7.* THE VICE-CHANCELLOR:—Even though such an agreement were made for an extended lease of ten years, as is alleged by the bill, still it was by parol and within the statute of frauds: and of which statute the defendant claims the benefit. There is not enough to take it out of the statute. Acts of part-performance, in order to have this effect, must be solely applicable to the parol agreement: *Frame v. Dawson*, 14 Ves. 386; *Morphett v. Jones*, 1 Swanst. 181; *Phillips v. Thompson*, 1 J. C. R. 131, 149. Here, the alterations in the building which the complainant proceeded to make were in the shape of repairs; and by the covenants in the original lease he assumed to make all necessary repairs, &c. Having commenced and removed part of the building with this view, he had no right to stop short and insist upon a new lease as an inducement for going on to complete the repairs which he was bound to make by the covenants in the lease which he already had. The improvements, by

way of repairs, therefore, could properly form no consideration for a promise to give a new lease, so that the breach thereof would operate as a fraud upon the complainant.

But the evidence does not make out satisfactorily that such an agreement for an extended lease was made as is set up in the bill and of which the complainant seeks a performance. The defendant denies it in his answer: and the testimony of the witnesses is too vague and indefinite in regard to the true import of the conversations to be relied upon in opposition to the answer. The terms and conditions upon which the defendant proposed and agreed to grant a new lease, as admitted by the answer, are very different from those claimed by the bill and are probably the same which the witnesses speak of as being the subject of the conversations they heard.

The complainant, then, having failed to establish such an agreement as he sets up in his bill, claims to have the benefit of the agreement which the answer admits was made and according to the terms of which the defendant, at the time of filing his answer, professed to be ready and willing to give a new lease. The difficulty, however, is, in its not being a part of the complainant's case; and if he meant, in this suit, to claim the benefit of the agreement which is set forth in the answer he should have amended his bill. It would be contrary to principle and against all authority to decree performance of a contract different from the one charged in the bill: *Lynsday v. Lynch*, 2 Sch. & Lef. 1; and see *Willis v. Evans*, 2 B. & B. 228; *Lagh v. Haverfield*, 5 Ves. 452; *Phillips v. Thompson*, 1 J. C. R. 146; *James v. M'Kernon*, 6 J. R. 559; *Pilling v. Armitage*, 12 Ves. 78.

If the defendant be still willing to give a new lease as profered in his answer and the complainant be ready to accept of the same upon the terms therein specified, there will be no necessity for a decree to this effect; and in case the defendant refuses to give such a lease upon a request for it, then resort may be had to a new bill. As in *Lyndsay v. Lynch*, the present bill must be dismissed, with costs; but without prejudice to the right of filing another, in case the complainant shall be so advised.

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BYRNE

v.

ROMAINE.

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v.

Burr.

## Burr v. Burr.

A feigned issue in divorce cases can only be made up to try the facts distinctly put in issue by the pleadings. General allegations are not regarded. Therefore, where a defendant recriminated generally, but gave neither time, person nor place, the court would not let the issue (applied for by the complainant) go to prove the complainant's conduct—although the defendant, when the issue was asked for, presented an affidavit stating names and declared he had been unable to put them in his answer.

Defendant, in an adultery case, took three months to put in his answer; and he therein, in general terms, recriminated by charging adultery, but was not specific. Three months afterwards he presented a petition setting forth the names, and stated his inability to give them when he filed his answer, and praying leave to amend in this particular. It was met by strong affidavits; and the motion was denied: the court considering it had a discretion in such cases.

Feb. 23d,  
1835.

Divorce.  
Practice.  
Feigned  
issue.  
Amendment.

Bill by wife for divorce *a vinculo matrimonii*, on the ground of adultery. The defendant, in his answer, recriminated: but only gave a sweeping allegation of adultery committed by the complainant, without specifying name, time or circumstances. A feigned issue, on the application of the wife, was ordered; and upon the making it up, the defendant presented an affidavit, setting forth that he had, since the filing of his answer, ascertained the names of parties with whom the complainant had committed adultery; and he now asked that in making up the issue it might have reference to such acts of adultery by the wife.

Mr. H. Wilson, for complainant.

Mr. O'Connor, for defendant.

THE VICE-CHANCELLOR:—The feigned issue to be made up in this cause is to be confined to the charge in the bill of the defendant's having committed adultery with the female named therein. The other charge in the bill is too general and indefinite. If the names of persons are unknown, time

and place at least should be specified. (2 Paige's Ch. R. 113.) With respect to the recriminatory charge in the answer: it is likewise too general and indefinite to be the subject of an issue; nor can the affidavit be received to help it out. According to the words of the statute, a feigned issue is to be made up "for the trial of the facts contested by the pleadings:" 2 R. S. 145, §. 40. The issue must be confined to the charges and denials contained in the pleadings; and in those relating to this cause, there is only one which is sufficiently definite, namely, whether the defendant has committed adultery with the person named.

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BURE  
v.  
BURE.

On a subsequent day, the defendant presented a petition, *May 18th.* which (after referring to the above decision in relation to the feigned issue, and mentioning the names of persons with whom the defendant believed the complainant had committed adultery, and excusing himself from not mentioning them in his bill, on the ground of his not having been enabled to give them with sufficient certainty) prayed for leave to amend his answer by specifying the names of the persons with whom the complainant had committed adultery as alleged in the said answer; and for further relief.

Strong affidavits were put in to oppose the motion—as will sufficiently appear by a reference to the opinion of the court.

**THE VICE-CHANCELLOR:—**The complainant has succeeded in shewing, by affidavits read in opposition to this petition, the entire improbability of there being the least truth in these recriminatory charges. Nay, more: that they have been set on foot from the worst of motives, and are attempted to be supported through the agency of one Coverney by subornation and perjury.

There must be some discretion used in granting or refusing applications of this sort. In *Smith v. Smith*, 4 Paige's Ch. R. 432, the fact of the husband's adulterous intercourse, while he was carrying on the suit against his wife, and which the wife discovered after the trial of the feigned issue, and wish-



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POWELL  
v.  
KANE.

ed to set up in her defence, was not denied; and in such case it was the duty of the court, as the Chancellor observed, to give the defendant an opportunity to recriminate by way of defence. But where the charges are so fully denied and even disproved as in this case, I think it is not the duty of the court to extend to the party the favor (for he comes now to ask it as a favor) of making these recriminatory charges in a way that they can be put in issue. The defendant had upwards of three months allowed to him to put in his answer. Here was a sufficient time to have enabled him to obtain the information which he now alleges he has got, viz: the names of persons with whom the complainant has been connected criminally. If he has not now the opportunity of specifying names in his answer to the bill, I think he has no reason to complain.

The motion must be denied; costs may abide the event.

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POWELL v. KANE and others.

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Where the court itself directs an affidavit to be referred to a master, who is to report whether there be impertinent or scandalous matter in it; there is no occasion to go into the master's office with exceptions embracing the part's supposed to be impertinent or scandalous.

Affidavits should contain matters of fact and not matters of argument: the latter will be impertinent.

The solicitor of a party had put impertinent and scandalous matter in his own affidavit used on a motion: He was ordered to pay the costs of referring it and of a hearing upon exceptions taken by him to the master's report.

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March 2nd,  
1835.

Practice.  
Impertinence  
and scandal  
in an affida-  
vit.

Affidavit.  
Solicitor.  
Costs.

The solicitor for the complainant had read his own affidavit upon a motion and therein reflected upon the opposite solicitor and his client; and the court underscored parts of it and upon the solicitor insisting that he had a right to be heard upon the subject of the alleged impertinence, the court directed that such parts should be referred to a master to report whether the same were not scandalous or impertinent. The master found them to be so. Exceptions were taken to

his report by the solicitor ; and one of these exceptions went upon the ground, that there ought to have been written exceptions to the supposed scandalous and impertinent parts, before the master could take cognizance of the same.

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THE VICE-CHANCELLOR decided, there was no occasion, where the court itself ordered a master to report upon scandal or impertinence in an affidavit, which had been produced in court and whereby the latter was thus in full view of its contents, to require the party moving the reference to go into the master's office with formal exceptions ; and that an order to refer was enough.

His honor also, in scrutinizing the deposition, said that affidavits should contain matters of fact only and not matters of argument : for the latter would amount to impertinence.

The Vice-Chancellor supported the report of the master ; and, determined, inasmuch as the improper affidavit was made by the solicitor himself in relation to a matter wherein his client had not interfered, that he alone must pay the costs of the reference and of the hearing upon the exceptions. There was no alternative or escape from this course : for the opposite party were entitled to be paid and the client on the other side ought not to pay for this act of his solicitor.

Order accordingly.

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AYRES v. VALENTINE.


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In a judgment creditor's bill, an error in the day of obtaining the judgment and issuing a *fi. fa.* allowed to be amended by interlineation (the day originally in the bill was a Sunday.)

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A judgment creditor's bill, under oath. An error was made in the day on which the judgment was docketed and the *fi. fa.* tested (the month and year were correct.) As

April 13th,  
 1835.  
  
*Practice.*  
*Amendment.*

1835.  
  
**BLOOMER**  
 v.  
**SHERMAN.**

appeared by the bill, it would seem to have all occurred on a Sunday and a prior motion (for a receiver) had been dismissed upon opposing counsel having found out the error. Application was now made, upon affidavits, to amend, by altering the date to the proper day.

*Mr. W. Silliman*, for the complainant.

*Mr. C. Walker*, contra.

**THE VICE-CHANCELLOR:**—The application to amend is based upon sufficient affidavits. I had a doubt how far amendment by striking out could be allowed. But here is a clerical error and the effect of what is wanted can be done by an interlineation. Take an order to amend correcting the date by interlineation, without prejudice to the injunction—serving a copy of the bill as amended gratis and paying the costs of the present motion.

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**BLOOMER v. SHERMAN. (a)**

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The time limited by deed for making an award, may be enlarged by parol.

The provision in the R. S. declaring that a party shall not revoke the power of arbitrators after a final submission upon hearing, is not to be confined to cases where the award is to be made a rule of court.

B. and S., as partners, signed arbitration bonds on the 14th of January; the award was to be made on the 10th February, but on the day before, the parties in writing—one signing and sealing and the other (B.) signing only—agreed that the time of “rendering” the award be extended to the 19th February; on the 11th February the arbitrators were ready to make their award and on the 18th February it was delivered to the parties. But on the 14th of the same month, B. had served the arbitrators with a revocation and another two days afterwards—on a bill filed by B. and a plea of the award: Held, that the revocation came too late; and the plea was allowed.

*April 22nd,*  
 1835.

Bill for winding up a partnership; and, for an account.  
 Plea, of a submission of the matters in dispute to arbitra-

  
**Partnership.**  
**Arbitration.**  
**Award.**

(a) This case went up to the chancellor, on appeal; and the decision in it was affirmed: See 5 Paige's C. R. 575.

tion and an award. The plea set out the arbitration bonds, containing the submission, bearing date the fourteenth day of January, one thousand eight hundred and thirty-five, conditioned to abide the award of three arbitrators "to be made in writing, subscribed by each of them and attested by a subscribing witness ready to be delivered to the parties on or before the tenth day of February (*then*) next." The plea also stated that afterwards and on the ninth day of February—inasmuch as the time for hearing the parties and making the award was not deemed sufficient—the parties endorsed upon the bonds and submissions an agreement in writing, duly executed and signed by them and sealed with the seal of the defendant, in these words:

"It is mutually agreed that the time for rendering the award of the arbitrators, as within, be extended to the nineteenth of February instant. New York, February 9th, 1835.

J. Sherman. (*seal*)

Elisha Bloomer."

The plea then further stated that the time being so extended, the arbitrators proceeded to hear the allegations and proofs of the respective parties; and after due deliberation, made their award in writing, under their hands, on the eleventh day of February, one thousand eight hundred and thirty-five, which was, afterwards, and on the sixteenth day of February, duly attested by a subscribing witness and ready to be delivered to the parties. That the said award was, on the eighteenth day of the same February, delivered to them by the arbitrators. The award was then set out, with an averment that it was made, in all respects, in conformity with the submission and within the time for making it according to the extension agreed upon by the endorsements on the bonds; and that the powers of the arbitrators were in no way revoked or limited before the case was finally submitted to them upon the final hearing, although an instrument purporting to be a revocation was, in the afternoon of the fourteenth day of the same February, duly executed by the complainant and served upon one of the arbitrators; and also, although, on the sixteenth day of February, another instrument of revocation, under the hand and seal of the complainant, was served upon the other two arbitra-

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tors, which declared the powers of the arbitrators to make and deliver any award entirely revoked.

The question was, upon the validity of the award ?

Mr. *S. Sherwood*, for the complainant.

Mr. *J. P. Hall*, for the defendant.

*September 7.* THE VICE-CHANCELLOR :—The validity of this award depends upon two questions : first, as to the effect of the agreement to enlarge the time for rendering the award ; and, secondly, as to the force of the revocation after the cause had been finally heard and submitted ?

As to the first point. The objection raised is twofold, that inasmuch as the submission was under hand and seal, and the time for making the award limited, the agreement to extend it should have been under hand and seal. The objection is not well taken. The time limited for making an award, where the submission is by deed, may be enlarged by parol ; and an award made within the time thus extended will be good as an award. The only difference it can make is in the form of the action or remedy to be had for enforcing it. This is clearly shown both by decisions in our own courts and by English cases : *Greig v. Talbot*, 2 Barn & Cres. 179 ; *Evans v. Thompson*, 5 East, 189 ; *Brown v. Goodman*, 3 T. R. 592, n ; *Freeman v. Adams*, 9 J. R. 115 ; *Myers v. Dixon*, 2 Hall's Superior C. R. 456 ; *Langworthy v. Smith*, 2 Wend. R. 587.

An agreement by parol to extend the time for making an award, in pursuance of a previous submission under hand and seal, continues and keeps alive the submission, as a submission by parol, if in no other way ; and an award made in pursuance of a parol submission in writing is just as valid and effectual as if made under a submission by deed. There is nothing in the case of *Suydam v. Jones*, 10 Wend. 180, or in the cases there cited to oppose this principle. The other branch of the objection is, that the extension of time by the agreement was not for the purpose of making the award, but for the "rendering," or, in other words, delivering it ; and it is contended that the arbitrators were, notwithstanding, bound to make their award and to do all that

was necessary, (except delivering it) within the time originally limited. One sense in which the word "rendering" may be used is *making*, and it would be giving to this word too strict and confined a construction and be contrary to the intention of the parties to hold that the arbitrators were still to proceed and hear the parties and make up their award on or before the tenth day of February. The object of extending the time clearly was to give the arbitrators until the nineteenth of February, in order to hear the cause and make their award as well as to deliver it to the parties.

The next question presented is, in relation to the revocation? At common law, in all cases of submission to arbitration, either party might revoke the power of the arbitrators at any time before the award was actually made and delivered. But the Revised Statutes contain a provision that "neither party shall have power to revoke the powers of the arbitrators after the cause shall have been finally submitted to them upon a hearing of the parties for their decision:" 2 R. S. 544, § 23. If this statute applies to the present case, there can be no objection to the award on the ground of a revocation: because, in point of fact, there was no attempt to revoke, until after the cause had been finally submitted as mentioned in the statute. I can see no good reason why the statute should not be held to apply. It appears to me to be a salutary provision made to take from the parties the right of revocation after they have gone through a hearing and submitted the matter in controversy to the decision of arbitrators; and I apprehend the legislature did not mean to confine it to cases where the parties have agreed that judgment of some court of law should be rendered upon the award. It is true that in all such cases the court, designated in the submission, has ample powers granted to it by statute to vacate the award or to modify and correct the same for cause shown and hence the parties are in no danger of suffering injustice from the decision of arbitrators where they are compelled to take their chance of a decision after they have voluntarily proceeded to a full hearing and finally submitted their cause. The same reason will hold good where the award is not, by agreement, subjected to the judgment of a court of law: because the com-

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mon law powers and jurisdiction of the court of chancery over arbitrators, awards and the parties therein, are expressly declared, by the statute, to be unimpaired and undiminished; and this court, in the exercise of its authority, can go as far as any court of law is permitted to do in reviewing a decision of arbitrators and correcting any error or misconduct which may have occurred. Further reasons might be given for not considering this restriction upon the power of revocation to apply merely to the case of an arbitration where the parties have agreed that the award might be converted into a judgment of a court of law. Indeed, it appears to me that the statute was intended to regulate the whole subject of arbitration and this too whether the parties had agreed to make the award a subject for judgment or not. If an agreement to this effect be contained in the submission, the powers of the court over the matter are declared and the course of proceeding to vacate or modify the award is prescribed—so likewise, where the submission is silent and contains no such agreement, there are many things regulated by the statute; thus, as to the persons competent to become parties to a submission—leaving it optional with them to agree or not about converting the award into a matter of record and judgment of some court—as to the matters which may be arbitrated, the course of proceeding, the attendance and examination of witnesses, the power to revoke and the consequences of a revocation—these are all pointed out as being applicable to arbitrations generally.

My conclusion is that the statute applies to the present case; and, consequently, the revocation mentioned in the plea came too late to have any effect upon the award.

There being no other objections to the plea, it is to be allowed, with costs.

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M., by will, directed a division of his personal estate among his five children and their issue, deducting however all advancements, provided the personal estate should be sufficient, by such deductions, to make an equal division of the same; and if not, that the income and rents of the realty bequeathed to such of the children having such advancement should be retained and appropriated to the repayment of such advancement until the same was reduced to \$5,000, and that such \$5,000, or any advancement under that sum should be considered a permanent loan, bearing interest, payable from the respective share and income of the rents of the party having such advancement and the principal to be deducted from the respective share of the real estate upon a final division. The personal property, including the debts due from two of the sons, amounted to \$27,830—one of these debts was for \$6,000, and the other \$10,000; and, owing to the deficiency of the personal estate, to give each of the children \$5,000, a question arose as to the manner of dividing the personalty: *Held*, that the personalty must be equally divided amongst the five children, without reference to these advances; and that such advances must be turned over to the real estate.

Thomas C. Morton, by his will bearing date the twenty-sixth day of April one thousand eight hundred and thirty-three (after bequeathing several specific and pecuniary legacies) devised the residue of his estate, both real and personal, to trustees, who were also appointed executors, in trust:

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1. To divide his library, as near as might be, equally amongst his five children;
2. Out of the rents and profits of his real estate to pay off and discharge all mortgages and incumbrances thereon;
3. After such payments in full, to divide the rents and income amongst his five children during their lives and the issue of such as should be dead, *per stirpes*, until the final division of the real estate as thereafter provided; this trust, however, to be controlled by the powers after granted;
4. On the death of the survivor of the five children, to sell the estate and divide the proceeds among the right heirs of the five children. If any of his sons should die without



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lawful issue surviving him, his share of the rents was to be paid to his widow for life. The children were to have power, by will or deed of appointment, to dispose of their shares of the rent and of the principal to any person or persons being descendants of the testator;

5. To divide the personal estate or the proceeds thereof, not before specifically bequeathed, to and amongst the five children and their issue, deducting, however, therefrom all advancements made to them, if the personal estate should be sufficient, by such deductions, to make an equal division of the same; and if not, then that the income and rents of the real estate, that is to say, the share and shares of the rents bequeathed to such child or children having such advancement, should be retained and appropriated to the repayment of such advancement, until such advancement or advancements were reduced to six thousand dollars each, and that such sum and sums of six thousand dollars or any advancement under that sum should be considered a permanent loan, bearing interest, payable from the respective shares of income and rents of the person and persons having such advancements and the principal to be deducted from the respective shares of the real estate upon a final division thereof.

The testator left real estate of the value of about sixty thousand dollars, which produced an annual income of three thousand four hundred dollars, but the same was encumbered by mortgages to the amount of about twelve thousand dollars. His personal estate, including the debts due by his sons Peter and Thomas, amounted to twenty-seven thousand eight hundred and twenty dollars; and of these debts, one was now reduced to six thousand dollars and the other was about ten thousand dollars—these sums remained due to the estate and were the advancements alluded to in the will.

Owing to a deficiency of the personal estate to give each of the five children six thousand dollars upon the division and on account of the impossibility of making an equal apportionment among them so as to allow any one to retain to the amount of six thousand dollars for his share, a question arose as to the manner in which the personal estate was to be divided by the trustees under the will? The bill

in the present case had been filed for the purpose of determining this question and to obtain the direction of the court in the matter.

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Mr. *Raymond* and Mr. *H. Maxwell*, for the complainant.

Mr. *S. A. Foote*, for the defendants.

**THE VICE-CHANCELLOR:**—No question has been made as to the validity of the will concerning the real estate. For the purposes of the present suit, all parties in interest must be deemed to acquiesce in the validity of the trusts of the realty as well as in those of the personal property.

The fifth trust-clause of the will, upon which this question arises, seems to me to admit of but one construction consistently with the object and meaning of the testator.

He, in the first place, directs a division and distribution of his personal estate, not otherwise specifically bequeathed, to and amongst his five children, deducting what is to be charged to each with all advances made to them, so that, in the division, the monies advanced by him in his lifetime to his sons are to be taken into the account and to constitute a part or to absorb the whole of their shares as the case may happen to be, having reference to an equality among them all: for he expressly says, "if said personal estate be sufficient by such deductions to make an equal division of the same." This equality, then, is a condition upon which a division, by bringing in the advancements, is to be made. But it turns out that the amount of the personal estate, including the debts or money owing by his sons, does not admit of a compliance with this condition. The amount advanced to each exceeds considerably a one equal fifth part of the whole twenty-seven thousand eight hundred and twenty dollars:—a division and distribution upon that principle therefore fails; and, in that event, the testator declares it to be his will that the shares of the rents and income of the real estate, as previously devised, belonging to such of the children as have received advancements, shall be retained and appropriated to the re-payment thereof until

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reduced to six thousand dollars each and that sum to be considered a permanent loan on interest chargeable upon their shares respectively of the real estate.

Here, then, by the express directions of the will, the amounts of the advancements, as they are called, which, in one event, were to be charged upon and taken out of the shares of the personal estate upon a division, but which event has not happened, are, in the alternative, transferred to and charged upon the real estate; and the ways and means are provided for the liquidation and re-payment of the whole amount out of the real estate to the entire exoneration of the shares of the personalty. It follows, as a necessary consequence, that the personal estate, which is still to be divided, must be apportioned equally amongst the five, excluding altogether the advances and taking no notice of them in the account of the personal estate or in the division.

As to the debts owing to the testator from some of his children and devisees: he has thought proper, in the event of such debts absorbing more than their equal shares of his personal property, to turn them over to his real estate to be paid out of the shares which he has given them there and which will be abundantly sufficient.

This appears to me to be a clear and simple exposition of the will and one which comports with the views which the testator has expressed. Any other construction or mode of dividing the personal estate than by simply deducting from the twenty-seven thousand eight hundred and twenty dollars the amount of the advancements to Peter and Thomas, and apportioning the residue into five equal parts and paying over to each child his and her one fifth part, leaving those advancements to be repaid and deducted from their shares of the real estate in the manner pointed out, which eventually will make them all equal, would, I consider, be making a new will for the testator, instead of conforming to the one already made.

Decree accordingly. Costs to be paid out of the personal estate.

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## GRISWOLD v. JACKSON and another.

In order that a decree may be pleaded as a bar in a second suit, it must bind the party against whom it is pleaded and be conclusive upon his rights or upon the rights of those under whom he claims; and can be no bar against a party or those claiming under him where he is not a party in the first suit.

Where a person holds hypothecated property and a tender is made of the amount due upon it and he refuses the tender, he makes the property so far his own as to run the chance of after depreciation and will be obliged to take it in full satisfaction should it prove worthless—and should there have been a surety, the latter then becomes released.

Bill filed in relation to a suit at law which had got to judgment. By the time the answer came in, execution had issued and the bill became fixed; and this was mentioned in the answer. But the court could not act upon it under this bill. The complainant should have filed a supplemental bill, asking for such relief as the new state of things would warrant.

The defendant, Caroline Dunham, not having redeemed the stock in the Williamsburgh Ferry Company, according to the decree made in the cause, wherein she was complainant, against the defendant Daniel Jackson—affirmed on appeal (see the case in 6 Wend. R. 22.); and the defendant Jackson having afterwards sued the present complainant at law upon his due bill given for the money advanced on the pledge of the stock, the complainant filed his bill in this cause to restrain the suit at law and to have the value of the stock applied in extinguishment of the debt.

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former suit  
in bar.  
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The bill alleged the borrowing of divers sums of money by the complainant of the defendant Daniel Jackson, and, among others, the sum of two hundred dollars at one time, for which he pledged to the defendant ten shares of the stock and that he had previously transferred to him one other share to enable him to hold the office of director in the Ferry Company; that these eleven shares were borrowed by the complainant of Caroline Dunham and the same belonged to her, but the complainant had authority from her to pledge them. That subsequently, the complainant, as agent for Caroline Dunham and on her account, borrowed


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of the defendant other sums, amounting to five hundred dollars, and transferred to him, by way of pledge and security for the repayment, forty other shares of the stock belonging to Caroline Dunham; that afterwards, in the month of March one thousand eight hundred and twenty-seven, the complainant caused to be tendered to the defendant the amount of the advances, being, altogether, about thirteen hundred dollars and demanded a re-transfer of the stock to Caroline Dunham, which the defendant refused, the stock being then worth eighty per cent. on the par value and since then it had become of no value whatever. That notwithstanding all this, the defendant had commenced an action at law against the complainant to recover the amount of his advances; and had held him to bail. The bill prayed that the defendant, Daniel Jackson, might be enjoined from prosecuting his suit at law and the complainant be indemnified for the depreciation of the said stock or of the eleven shares thereof or might have such other relief as would be agreeable to equity.

The answer of the defendant, Daniel Jackson, denied that the complainant was the agent of Caroline Dunham, in these transactions; and insisted that, although her name was used in his business operations generally, it was so done for the purpose of disguising or concealing his own interest therein from his creditors, he being an insolvent debtor—and that when he applied for the loan of five hundred dollars on pledge of the forty shares of stock, it was on his own behalf and not on her account, and the defendant did not suppose the complainant was acting (in obtaining the money) for any other person than for himself. That, at that time, the complainant proposed that he, and not Caroline Dunham, would pledge the forty shares for securing the repayment, not only of that amount but of all the moneys previously borrowed by him of the defendant. That he had previously, on the occasion of borrowing two hundred dollars, delivered to him a script for ten shares in the defendant's name as a security for the repayment of the sum then loaned: and when the loan of five hundred dollars was made and the script for the forty shares was delivered, it was understood and agreed between them that the same were to remain subject to the

repayment of all his said advances, for which the complainant gave him due bills and receipts in his own name as evidences of his indebtedness on account thereof; nor did the defendant have any notice or information or any reason to suppose the forty shares of stock were the property of any other person than the complainant until sometime after advancing the last portion of the five hundred dollars and about the middle of the month of March, one thousand eight hundred and twenty-seven, when, for the first time, he was informed that the forty shares of stock were the property of Caroline Dunham and then, upon examination of the books of the Williamsburgh Ferry Company, it appeared that the forty shares had been transferred to him by her: "although this defendant believed, notwithstanding, that they were, so far as regarded the equitable title thereto, the property of the complainant and wholly under his control and that Caroline Dunham was possessed thereof in trust for the complainant and he had, in fact, the sole management thereof." With respect to one share of the stock alleged to have been transferred to the defendant, in order to render him eligible as a director of the company, the answer admitted the fact, although the defendant said he did not know of it until some time after it took place; but whether this one share and the ten shares were borrowed from Caroline Dunham by the complainant or belonged to her, the defendant was entirely ignorant. He insisted, however, that subsequently to the transfers it was well understood between him and the complainant that the eleven shares were to be held by him in pledge for the whole amount due him from the complainant. The answer then proceeded to deny the tender or offer of payment as alleged in the bill, except as to five hundred dollars, which he, the defendant, admitted was offered to be repaid and he was requested to assign the stock on payment of that sum and the complainant did not offer to pay the whole amount of one thousand and three hundred dollars or make any offer whatever, other than to pay the five hundred dollars upon having a retransfer of the stock which was declined by the defendant. That he (the defendant) had always insisted, and he still insisted "that the loans were made to the complainant on his own account and that he, the defendant, had not only frequently, but al-

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ways, refused to recognize Caroline Dunham as having any thing to do with the transaction." The answer then referred to the filing of the bill against him in this court by Caroline Dunham to redeem the forty shares of stock, the proceedings in the suit, and the decree therein for redemption upon her paying to him the amount, not only of the five hundred dollars, but of his other advances and if not paid within three months, together with the costs, she was to be foreclosed of all equity of redemption and her bill was to be dismissed with costs—which decree, being affirmed on appeal and she not having redeemed, the defendant set it up in bar of all relief sought or claimed by the complainant in this suit. He admitted the stock had become of no value; and that he had sued the complainant at law and held him to bail and, at the time of putting in the answer, had recovered a judgment against him in the action for one thousand four hundred and twenty-one dollars and fifty-one cents damages and costs.

A provisional injunction had been granted on the filing of the bill, permitting the defendant to go to trial and judgment at law. On the coming in of the answer under oath (although the oath had been waived by the bill) the injunction was dissolved, on the ground of the denial of the tender and there being no affidavit of a witness filed with the bill to support the allegation of such tender.

Proofs, however, had been taken in relation to this alleged tender and also as to other matters, in order to show the intrinsic value of the stock and the amount which Caroline Dunham or the complainant, acting in her name, could have realized for the shares in question at the time of such tender.

Mr. Tracy's testimony, on the subject of the tender, went further than it did on his former examination in the cause of *Dunham v. Jackson*. It was held in that case, both by the chancellor and the court of Errors, that what was represented by Mr. Tracy and another witness to have taken place did not amount to a lawful tender of the money. But the testimony now (in the opinion of this court) came up to the point and showed that a sufficient tender was made within the admitted doctrine of the cases cited and recognized by Mr. Justice Marcy and as to what constituted a

legal tender when the money was not actually produced : 6 Wend. 34. It now appeared that the actual production of the money was expressly waived or agreed to be dispensed with by the defendant.

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Mr. *Field* and Mr. *R. Sedgwick*, for the complainant.

Mr. *S. A. Foote*, for the defendant Daniel Jackson.

THE VICE-CHANCELLOR :—The fact of a sufficient tender *January 11.*  
 must, for the present, be deemed established; and this is 1836.  
 very important to the complainant's case: for without it his bill could not be supported for the purpose of throwing the loss, arising from the subsequent depreciation of the stock, upon the defendant.

The question nevertheless arises: what right has the complainant to file a bill for this purpose?

It appears to me that whether he be viewed in the light in which the bill represents him, that is to say, as an agent of Caroline Dunham, raising the money on the pledge of the stock as belonging to her and for her account, making himself personally liable for the repayment and therefore standing in the character of a surety or whether he be considered, as the answer insists he was, the equitable owner of the stock and entitled to all the beneficial interest in it, that this can make no difference in respect to the principal ground of defence, namely, that the proceedings and decree in the former suit are a bar.

It is objected, that in respect to the forty shares of stock, the decree in the former cause settled the rights of the parties and protects the defendants from all liability to account for the value. In the former suit it is true that Caroline Dunham failed in throwing the loss, arising from the depreciation of stock, upon the defendant, because the evidence fell short of proving a lawful tender of the money so as to entitle her to a return of the shares at a time when they were worth to her eighty per cent. of their par value: and as the cause stood upon the evidence, the court could do no more than ascertain the amount of the indebtedness for which the stock was pledged and decree a redemption upon



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payment of such amount—and in default of payment hold her foreclosed of all right afterwards to redeem. The effect of her omission to redeem under this decree was to vest the defendant with the absolute ownership of the forty shares (for it did not extend to the other eleven) and he had then a right to dispose of the stock as he should think proper, giving credit for the value and looking to those who were personally liable for the whole or balance of his debt.

If such recourse were had to Caroline Dunham, she would be precluded from again calling in question the fact of a tender and claiming to be allowed the value of the stock at the time: because, as between herself and the defendant, it was a matter *res judicata*, and all she could claim would be a credit for the value at the time it became the defendant's property by the foreclosure. But when recourse is had to the complainant, it appears to me he is not in a situation to be precluded by the former decree. He was not a party to the suit in which it was made; and I do not perceive how he can be bound by the adjudication on the question of tender. In order that the decree may be pleaded or set up as a bar, it is necessary it should bind the party against whom it is pleaded: but no one can be bound by a decree unless he is a party to the suit or the representative of a party or one who can claim in his right the same equity already passed upon. Hence, the general proposition that a former decree may be pleaded in bar to a new bill relative to the same matter between the same parties; and the converse of the rule is equally true that a former decree cannot be so pleaded, unless it be conclusive upon the rights of the plaintiff in the second bill or of those under whom he claimed: Mitford, 4 ed. 238; Beames on Pleas, 211. Upon this principle it was held by Lord Hardwicke, in *Atkinson v. Turner*, Barnard. 74, that where the plaintiff in the second suit was no party to the suit in which the decree was made, such decree could not be set up in bar; and one reason may be found in *Doyley v. Smyth*, 2 Ch. Ca. 119, where a dismissal was pleaded in bar to a new bill filed by a third person on the ground of the same equity—and the plea was overruled: because the plaintiff in the new bill could not have a bill of review of the former decree, he not being a

party, although the new bill and the former one were founded upon the same equity. In *Neafie v. Neafie*, 7 J. C. R. 1, Chancellor Kent had occasion to examine the effect of a decree of dismissal of a former bill on the merits (and the decree in the suit of Caroline Dunham was a decree of dismissal, although, at the same time, it foreclosed her equity of redemption) and he appears to have considered that to render, a dismissal a technical bar, it must be an absolute "decision upon the same point or matter and the new bill must be by the same plaintiff or his representatives against the same defendant or his representatives." In other respects, also, I think the reasoning of Chancellor Kent, in *Neafie v. Neafie*, has an important bearing upon the point under consideration and serves to show that the complainant cannot be precluded, by the former decree, from filing a bill for the relief which is now sought. Other cases may be mentioned to elucidate the principle still further—as where a mortgagee forecloses the equity of redemption against the mortgagor, without making a subsequent mortgagee or incumbrancer a party to the suit: such decree cannot be pleaded or set up in bar of a bill filed by the second mortgagee or incumbrancer to redeem; and the reason is, because he was not made a party to the first suit. This has been held, even where the first mortgagee had no notice of the second mortgage or incumbrance when he filed his bill and took the decree: *Godfrey v. Chadwell*, 2 Vern. 601, *Morrell v. Westerne*, Ib. 663. In such cases it may be said that the equity of the second mortgagee is of the same nature as the mortgagor's: a right to redeem from the first mortgage; and yet, by the decree, the one is foreclosed or barred of his right and the first mortgagee is apparently quieted in the possession and enjoyment of the estate. But it is only so with respect to the party to the suit and he who was not a party and has a distinct equity of his own is still at liberty to enforce it; and, notwithstanding one decree of foreclosure, the property is still liable to be redeemed by those having claims who were not made parties to the suit for that purpose. If, therefore, there are any circumstances in this case to give the complainant a stand-

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ing in court to sustain his bill, I am of opinion the proceedings and decree in the former suit of Caroline Dunham present no technical bar to his relief.

Viewing the complainant in the light of an agent for Caroline Dunham in the transaction, in relation to the pledge of the forty shares of stock, and as a surety for her in consequence of making himself personally liable by his due-bills for the money borrowed, and there is sufficient equity in this case to give him a standing in court.

The general doctrine with respect to the right of a surety in equity to have the benefit of any collateral security or pledge held by the creditor delivered up to him upon his paying the debt and in some cases to have the creditor turned round to pursue and exhaust his remedy against the property or thing pledged to him by the principal debtor before compelling the surety to pay, is too well understood to need any explanation here. The complainant is sued at law for the debt for which the stock was pledged. It can be of no use to him now to have it delivered up or retransferred; and nothing can be realized from it in the hand of the defendant towards reducing or extinguishing the debt. It is, indeed, entirely lost. By the tender of the money and the defendant's refusal to deliver up the property when a value was attached to it, the defendant must be considered as making it his own; and any depreciation from thenceforth must necessarily be borne by him. If Caroline Dunham had proved the tender, there could have been no doubt but such would have been the result. Her cause turned upon that point and it failed, because her proof was defective. There is no deficiency of proof in the present case; and if the complainant be considered as a surety called upon to pay, is he not entitled to similar relief? It appears to be settled that the equity of a surety to which I have alluded will be extended to relieve him from his suretyship, without payment of the money, when the creditor has, by his own act, destroyed the pledge or rendered the collateral security which he had taken of no avail or has put it out of his power to give the surety the benefit of the substitution. The case of *Hayes v. Ward*, 4 J. C. R. 123, contains all that is necessary to be said upon the subject. There the defendant, a

creditor upon promissory note endorsed by the plaintiff without consideration—and therefore a mere surety—had taken from the maker of the note a bond and mortgage as collateral security for the debt. He, nevertheless, sued the endorser at law without resorting to the maker of the note or the mortgage security; and upon a bill filed by the endorser to stay the suit at law and to be relieved from the payment of the note upon the ground that the defendant, by his voluntary act, had impaired the security of the mortgage by infecting it with usury and had thus rendered it unavailable to the complainant, in case he should pay the note and be substituted as the holder of the mortgage for his indemnity, the court enjoined proceedings in the suit at law until the defendant should make a fair experiment with his remedy upon the mortgage. This case did not, necessarily, in the then stage of it, call for a decision upon the point which is now presented: for the court went no further than to grant a temporary injunction until the effect of a proceeding on the mortgage and its validity could be tried. If it failed by reason of the alleged usury and the defendant should then resort again to the surety on the note, it would be time enough to decide whether he should pay it. But the chancellor states the general principles founded on equity and natural justice which the court should act upon in such cases—and these are that a mortgage or other collateral security taken by the creditor is taken and held in trust as well for the secondary interest of the surety as for the more direct and immediate benefit of the creditor and the latter must do no wilful act to poison it in the first instance or to destroy or cancel it afterwards; and if he has destroyed the validity or value of his own security taken from the principal debtor, he cannot have recourse to the surety: because he has voluntarily disabled himself from affording to the surety the requisite substitution. This right of substitution is a valuable right belonging to the surety; and the creditor must do nothing to impair it. The very taking of that security by him may have excited confidence in the surety and deprived him of the opportunity of taking other and sound security for his own protection.

These principles, which are undoubtedly correct, apply

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to the present case, considering the complainant as a surety and the fact of a tender to be established—and hence arises an equity to support the present bill. And if he be regarded, not in the character of a surety, but as the beneficial and equitable owner of the stock, called upon as the principal debtor to pay the money borrowed, still I do not perceive he stands in a more unfavorable position, with respect to equitable relief. The property pledged has been lost to him by the defendant's refusal to return it upon demand and tender of his whole debt; and he can have no right to sue for and recover such debt without making a proper allowance for the value of the pledge which he must be considered as having converted to his own use. The complainant does not seek to redeem, but to stay proceedings at law and to have the value of the stock, as it was at the time of the tender, applied in compensation or extinguishment of the debt. There seems to be no doubt but the value of it at that time to the owner was more than sufficient for the purpose; and in every view which I am able to take of the case, I have been led to the conclusion that the complainant is entitled to have the value so applied.

It was suggested, upon the hearing, that after the injunction was dissolved, an execution had issued upon the judgment and the complainant's bail became fixed and were compelled to pay the debt; and I am asked to decree an account and restitution of the money. I can take no notice of the suggestion. If the fact be as stated and it is properly a matter which could come before this court, the complainant should have filed a supplemental bill, asking for such relief as this new state of things might warrant. As the case stands upon the bill originally filed, no other decree can be made than that the defendant Daniel Jackson be perpetually enjoined from proceeding at law to enforce the payment of the debt which, according to the answer, has gone to judgment.

A reference to take an account would seem to be unnecessary; and upon this bill I cannot decree restitution to the complainant or his bail. The defendant must pay the costs of the present suit.

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## JACKSON v. BAKER.

Where several things are stipulated to be done—some of which, if not performed, might lead to much and others to little injury, and one amount of forfeit only, in case of default, is inserted, it will be looked upon as a *penalty*. But where each particular act is connected with a particular specified forfeiture, in such case each neglect will make each forfeiture *liquidated damages*.

B. agreed in writing to sell I. a house, which was mortgaged. The bond and mortgage were to be taken up at a specified time. I, was, in the meantime, to have the property insured. For any violation of the agreement or any part thereof the parties mutually agreed to forfeit and pay to each other five thousand dollars as liquidated damages. The purchase was consummated by B's giving a deed and receiving from I. the consideration less the amount due on the mortgage; but I. did not take up the bond and mortgage within the time stipulated, although he did not appear to be acting wilfully. B. brought an action, in consequence, to recover the five thousand dollars as liquidated damages. On a bill by I. to restrain the action, the court *Held* the amount a penalty only: and gave B. the liberty of ascertaining his damages through a reference; but intimated (inasmuch as his damages could be nominal only) that further proceedings on his part would be at the peril of costs. If he waived all pretension to damages, a perpetual injunction was to issue and each party was to bear his own cost. Chancery, having jurisdiction, can, where it is necessary, ascertain the damages of a party by an issue of *quantum damnificatus* or by a reference.

The defendant, William F. Baker, had brought an action *May 21, 22,*  
in the court of Common Pleas for the city and county of *1835.*  
New-York against the complainant, Joseph Jackson, to  
recover the sum of five thousand dollars, alleged to have *Penalty.*  
been the amount of liquidated damages contained in an *Liquidated*  
agreement. *Damages.*

This agreement was made in writing between the complainant and defendant on the tenth day of November one thousand eight hundred and thirty-one; and by it the said William F. Baker agreed to sell to Jackson a house and lot known as No. 29 Bowery, corner of Bayard Street in the City of New-York, for the sum of twelve thousand, seven hundred and fifty dollars, subject to a mortgage of eight thousand dollars. The balance of four thousand, seven hundred and fifty dollars to be paid by the complainant on or before the sixth day of December thereafter; and upon the payment of that sum, the defendant was to execute to

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the complainant a warrantee deed, with full covenants, for the said premises, free and clear of all incumbrances, except the said bond and mortgage held by Mr. Lenox—and which bond and mortgage were to be taken up and cancelled by the complainant on receipt of the deed or as soon as the said Lenox or his assigns should require payment and a new bond and mortgage given, if necessary, by the said complainant to the said Lenox or his assignee. If said Lenox should not require payment previous to the first day of June then next, the same was not to be left outstanding and uncanceled of record after that date. And between the last mentioned time and the sixth of December, the said complainant was at liberty to have carpenters and masons to repair and fix, but not to make alterations. Jackson was also to have the premises insured. For any violation of the said agreement or any part thereof the parties mutually agreed “to forfeit and pay to each other the sum of five thousand dollars as liquidated damages, to be paid by the party who should violate the said agreement or any part thereof.”

On the sixth day of December one thousand eight hundred and thirty-one, the complainant paid the defendant four thousand seven hundred and fifty dollars; and received a deed executed by the defendant and his wife. The mortgage held by Mr. Lennox was not redeemed or exchanged within the time stipulated by the agreement; and this was the cause of the present action. There did not appear to have been any wilful delay on the part of the complainant.

The bill was filed for a perpetual injunction staying proceedings at law upon the agreement and that the latter might be delivered up and cancelled and the defendant pay the costs of the suit at law; and for further relief.

It appeared that the attorney, when drawing up the agreement, asked what amount of damages he should put in, when the defendant said three, four or five thousand dollars and that the complainant rejoined, “yes—five or ten thousand dollars—any sum Mr. Baker is willing I agree to. I am willing to pay any amount if I don’t fulfil it on my part and Mr. Baker must do so on his part.”

The complainant alleged the intention to have been a penalty, while the defendant insisted upon the meaning of the parties to have been, strict legal damages.

A tender of the costs at law had been made.

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Mr. T. C. Pinckney, on the part of the complainant.

Mr. Clarkson, for the defendant.

THE VICE-CHANCELLOR:—The great point in this cause is, whether the five thousand dollars, stipulated to be paid for any violation of the agreement, is in the nature of a penalty or to be understood as liquidated damages? The words are “for any violation of this agreement or any part thereof, the parties hereby mutually agree to forfeit and pay to each other the sum of five thousand dollars as liquidated damages, to be paid by the party who shall violate this agreement or any part thereof to the other party.”

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If this be a penalty introduced only for the purpose of securing a performance of the covenants, then all that either party can recover for a non-performance or breach is the actual damage sustained, and this would be the result in a court of law as well as here. But if it enter into and form a part of the contract to pay so much money as a fixed and ascertained amount for any violation of the articles of agreement, then neither this court nor a court of law can have any right to interfere with it.

It is to be observed, that the contract provides for the performance of a number of things on both sides—some of greater and others of less importance—and the non-performance of any one act within the time specified would be, in terms, a violation of the agreement and subject the delinquent party to the payment of the whole sum of five thousand dollars damages. There might be a trifling omission producing no actual injury or inconvenience: and yet the same consequence would follow as if the loss or damage were sustained to thousands of dollars. In such cases the rule appears to be established, to consider the sum, stated to be paid upon a breach, as a penalty; but where it is



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agreed that if the party fail to perform a particular thing, then such a sum shall be paid by him, having reference to the particular act, the non-performance of which is thus to be compensated for, there the sum stated will be treated as the amount of damages already liquidated. This principle was laid down by Heath J. in *Astley v. Weldon*, 2 Bos. & P. 346, when Lord Eldon presided in the Common Pleas; and it has been approved and acted upon repeatedly since.

In *Kemble v. Farron*, 6 Bing. 141, the words used in the agreement were as precise and explicit as they could be to show, not only affirmatively that the sum of one thousand pounds should be taken as liquidated damages, but negatively also that it should not be considered a penalty or in the nature thereof—and yet, upon the principle above stated, on the authority of *Astley v. Weldon*, Ch. J. Tindal held, and it was the unanimous opinion of the court, that as the agreement contained various stipulations of various degrees of importance and the clause fixing the sum was general and applied to the whole, it must be considered in the nature of a penalty and could not be deemed liquidated damages, unless the agreement had specified the particular stipulations to which the sum fixed upon as damages was to apply. In *Lowe v. Peers*, 4 Burr. 2225; *Reilly v. Jones*, 1 Bingh. 302; *Barton v. Glover*, Holt's N. P. Cas. 43; *Farrant v. Olmuis*, 3 Barn. & Ald. 692, and *Crisdee v. Bolton*, 3 Carr. & P. 240, the contracts had either one specific object or the agreements for liquidated damages were all confined to some specific breach. In *Davis v. Penton*, 6 Barn. & Cress. 216, the agreement was for the sale of a good will of a business, with a variety of special provisions inserted in the agreement, and then this clause “and for the true performance, each party binds himself to the other in the penal sum of five hundred pounds to be recovered for any breach of the agreement in any court or courts of law as and by way of liquidated damages.” Here, the court said, it could not be both penalty and liquidated damages; and Bayley J. observed: “we must look at all parts of the instrument, in order to ascertain whether it was the intention of the parties that the five hundred pounds should be a penalty or liquidated damages.” Now, where the sum which is to be

the security for the performance of an agreement to do several acts will, in cases of breach of the agreement be, in some instances, too large and in others too small a compensation for the injury thereby occasioned, the sum is to be considered a penalty. Holroyd J. expresses himself to the same effect; and Mr. Justice Littledale remarks: "Since the statute 8 and 9 Will. 3, parties, in framing agreements, have frequently changed the word *penalty* for *liquidated damages*, but the mere alteration of the term cannot alter the nature of the thing; and if the court see, upon the whole agreement, that the parties intended the sum to be a penalty, they ought not to allow one party to deprive the other of the benefit to be derived from the statute."

These are the principles upon which the English Common Law Courts have dealt with this question; and it is quite apparent that the inclination there is in favor of construing a sum specified to be paid upon any breach of the contract rather as mere form than conventional. A note from the pen of the reporter, in 5 Cowen, 150, contains some very valuable hints on this subject, corresponding, in principle, with the views which the judges in England have since taken in several of the cases above referred to; and in addition to all this, I think the case of *Dennis v. Cummins*, 3 J. Ca. 297, from its analogy, is an authority for considering the present a case of a penalty. There, the covenant was that in case either party failed to fulfil the agreement, the party failing to perform should forfeit and pay to the other the sum of two thousand dollars as damages; and the Supreme Court, judging from the whole instrument and the nature of the transaction, construed the sum to be a penalty and nothing more. Here, the like words were used—"forfeit and pay" so much; and whether as "damages" or as "liquidated damages" can make little or no difference in the meaning and certainly not enough to justify an entirely different legal construction of the expressions.

Some reliance is placed upon the evidence, which it is said the defendant's answer furnishes, of the parties mutual understanding at the time of reducing their agreement to writing, namely, that the sum inserted was not a mere penalty, but an amount actually agreed to be paid as damages

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in case of any breach of the agreement. The answer gives the conversation which took place at the time ; and the suggestion, to insert something by way of damages for breach of the agreement, appears to have come from the person employed to write it and while he was in the act of doing so—and there is nothing to show that the parties had previously, in their negotiation or in settling the terms of the contract, thought of the matter. The answer states, that when it was asked if there were to be any damages for violating the agreement, each party replied “yes;” and on again enquiring what amount should be inserted, the defendant said “three, four or five thousand dollars,” and the complainant said, “yes, five or ten thousand dollars—any sum Mr. Baker is willing I agree to—I am willing to pay any amount if I don’t fulfil it on my part and Mr. Baker must do so on his part”—and then the writer put in the sum of five thousand dollars. This, to my mind, does not look much like liquidated damages—or adjusting or settling an amount of damages, when it was a matter of perfect indifference to the parties whether the sum should be three thousand or ten thousand dollars; and, however it may appear in words, it comports much better with the manner in which that clause happened to be inserted in the agreement to give to it the character of mere form than of absolute substance. There is, besides, some testimony to show that the parties had not any very distinct idea beyond that of its being a penalty, for they spoke of it afterwards as a penalty which the complainant was under to get up the outstanding mortgage which had been given by the defendant. I think it is to be considered in no other light.

The next question then is, whether the complainant is entitled to any and what relief in this court? In the suit at law, which this bill was filed to restrain, the question of penalty or liquidated damages could as well be determined there; and in suits for penalties, courts of law permit plaintiffs to recover no more than their actual damage. Still, the complainant, being sued at law, had a right to resort to this court for an injunction and for relief against the penalty; and this court having jurisdiction, can, where it is necessary, ascertain the damages by an issue of *quantum damnificatus*:

*Sloman v. Walter*, 1 Bro. C. C. 418, or can ascertain the damages by reference to a master. At most, the damages would seem to be merely nominal—no other breach of the contract is alleged than the mere delay (until about the first of September) in taking up the bond and mortgage which the defendant had given and which the complainant had assumed to pay and discharge by the first day of June preceding, and from which delay the defendant sustained no perceivable actual injury or inconvenience. I consider the defendant was clearly wrong in taking the ground, as declared by his attorney, that he meant to exact every cent of that five thousand dollars as damages and by refusing to discontinue the suit at law on tender of his costs. The complainant appears to have been willing also to pay any damages which the defendant or his attorney could point out he had sustained. Hence, I am of opinion this controversy should not have been prolonged.

If the defendant desire it, I will direct a reference to give him an opportunity of proving the damages, if any, which he has actually sustained; and all further directions can then be reserved until the master's report comes in: but further proceedings will probably be at the peril of costs against the defendant. If he now chooses to waive his pretension to damages, I shall at once decree a perpetual injunction against any further proceedings at law for breach of the covenant; and leave each party to bear his own costs.

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IN THE MAT-  
TER OF OAK-  
LEY.

In the matter of the petition of OAKLEY and others.

A party was interested in a bond and mortgage. D. gave a power of attorney to B. in 1824., to receive the amount coming to him whenever the mortgage should be paid off and to pay himself monies due and other parties designated and to whom he, (D.) was also indebted: Held, that the statute of limitations did not run against the debts and that these creditors were justified in waiting until the mortgage was paid off—nor was payment to be presumed from lapse of time.

Where a power of attorney is given to pay the debt of another who holds a promissory note, such debt—after lapse of time—will be valid, although the note may not be forthcoming. There has been substituted security.

A mortgage is made to a church; and a person, interested in the mortgage money, sells his interest in it to a trustee of the church: Such trustee can only charge against the church the amount he paid for it. He must, as to the rest, be considered as having acted for his church.

June 23d.  
1835.

*Statute of  
limitations.  
Power of at-  
torney to pay  
a debt.  
Trustee.*

On the fifth day of April one thousand eight hundred and twenty-four, the Abyssinian Baptist Church executed a bond and mortgage to Joseph Warren Brackett and Samuel Lewis, for securing one thousand seven hundred and sixty-eight dollars and seventy-six cents. (This was made subject to a prior mortgage for three thousand five hundred dollars executed by the church to John Rankin and Letitia Van Vechten, in trust for the estate of John Van Vechten, deceased.)

A declaration in writing was executed under the hands and seals of the said Joseph Warren Brackett and Samuel Lewis, showing they were only trustees and not mortgagees in fact and that the mortgage monies in the mortgage to them were the proper monies of the persons and in the amounts following, namely, Richard Deane nine hundred and seventy-five dollars and seventy-six cents, Henry Dennis one hundred and fifty-four dollars, John Anderson two hundred and thirty-one dollars, Samuel Lewis sixty-one dollars, Benjamin Smith one hundred and twenty-five dollars, Jesse Davis one hundred dollars, Mary Jackson thirty dollars and fifty cents, Jane How twenty dollars and fifty cents, Diana

Berry fifteen dollars and twenty-five cents and Grace Merrick forty-five dollars and seventy-five cents.

On the thirty-first day of December one thousand eight hundred and twenty-four, Richard Deane, one of the *cestuis que trust* of the mortgage, being indebted to the said Joseph W. Brackett and others, executed a power of attorney in favour of Brackett, empowering him to control and dispose of the bond and mortgage aforesaid and thereout pay himself, then to pay one Alexander De Regulus two hundred dollars, with interest, and for which the said Regulus then held his note, also to pay Thomas Ritchie two hundred and twenty dollars, and to hold the balance to his, the said Deane's, own order.

Joseph W. Brackett afterwards died, having made his will, whereby he appointed Daniel Oakley, William P. Hawes, Benjamin Clark and his widow executors and executrix—but Mess. Oakley and Hawes alone qualified.

Samuel Lewis, the other trustee in the mortgage, died, leaving his widow him surviving.

In consequence of the deaths of Brackett and Lewis, there was no one to execute the trusts of the bond and mortgage.

Richard Deane died in foreign parts. Benjamin Smith, another of the *cestuis que trust*, died, having made his will and appointed Thomas L. Jennings his executor.

Jesse Davis, another of the *cestuis que trust*, was also dead, and his widow was his administratrix—and the said Thomas L. Jennings was her agent and attorney.

Grace Merrick, a *cestui que trust*, had died, but prior thereto all her interest in the bond and mortgage had been purchased by the said Thomas L. Jennings. It appeared that Jennings was one of the trustees of the church.

Mary Jackson, a *cestui que trust*, was alive and had married Manich Francis. Jane How also was alive, now the wife of Anthony Lane. Diana Berry was dead; and had left a daughter. Jane Dennis was residing in New-York. And Henry Dennis, the remaining *cestui que trust*, had been absent for five years and was supposed to be dead.

All the above facts were detailed in a petition, presented by Daniel Oakley, William P. Hawes and Thomas Jen-

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IN THE MAT-  
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nings; and which petition prayed the appointment of a trustee in the place of Joseph W. Brackett and Samuel Lewis deceased, for the purpose of collecting the amount due upon the bond and mortgage and to distribute the proceeds, &c.

A reference was had under this petition; and Philo T. Ruggles, Esquire, was appointed the trustee.

The solicitor for the Church then proposed that if the newly appointed trustee would consent to a reference to a master to take proof of the amounts actually due to the several parties interested in the mortgage, the amounts should be paid without a resort to foreclosure. The trustee thereupon presented a petition for the direction of the court; when an order was made to take proofs accordingly. The reference had been had; the master reported in favor of the claims of Brackett's executors, of Regulus, of Benjamin Smith, Jesse Davis and Grace Merrick and also in favor of some other of the *cestuis que trust*. The administrators of Deane appeared before the master and contested the claims of Brackett's executors and of Regulus; and took exceptions to the report on account of their allowance. The church also excepted to the allowance to Jennings, as the representative of Grace Merrick, of more than the amount he actually paid for her interest.

*Mr. J. Miller*, for the administrators of Dean and in support of the exceptions.

*Mr. James Smith*, for the Abyssinian Church.

*Mr. Hawes*, contra.

*December 8.* THE VICE-CHANCELLOR:—The evidence is sufficient to warrant the master's report of the amount due to the executors of Brackett as against the administrators of Richard Dean. The power of attorney executed by Deane to Brackett is a power coupled with an interest and a trust is, at the same time, created for the purposes therein specified. It has reference to the security and payment of any monies then due when the bond and mortgage should be paid off.

The power operates as an assignment of his interest in the bond and mortgage for the purpose of securing any debt or demand then existing in favor of Brackett, as well as any that might afterwards accrue to him, and also for the purpose of paying the specific debts owing by him to Regulus and Ritchie when the money should be received on the bond and mortgage from the church. A court of equity, under such circumstances, cannot permit the statute of limitations to be set up in bar of the demands. Nor is the presumption of payment to be raised. A means of payment being provided, through the medium of the power, out of the mortgage, the creditors might wait, relying upon the security, until the mortgage should be paid off, without incurring the danger of presumption from the lapse of time. There is enough in this case to repel the presumption of payment. The burthen of proof is upon Dean and his representatives to show payment, provided payment of these demands has been made.

With respect to the note which Regulus held for two hundred dollars and not now produced, it may well be supposed it was given up when the power of attorney was executed—there would be no necessity for holding the note any longer. The power provides for the payment of a specific amount, with interest, if required; and it may be considered a substituted security and the note no longer of any consequence. Hence, no presumption of payment of the note is to be drawn from the circumstance that this note is not now produced. For these reasons, I am of opinion the exceptions taken by the administrators of Dean must be overruled.

As to the one exception taken by the Church in respect to the allowance to Jennings, as assignee of Grace Mcrick, of forty-five dollars and seventy-five cents: this is well taken. Jennings, being a trustee of the Church and having bought up this demand for twenty dollars, which is the consideration expressed in the assignment, can charge the Church no more than he paid for it. Any benefit from this bargain belongs to the Church, in whose behalf he must be considered as having acted. This exception is allowed.

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 GIBBS
 v.
 MERMAUD.

GIBBS v. MERMAUD.

A surety in a bond cannot have a writ of *ne exeat* against the principal as incidental to relief.

G. had become surety that M., a captain of a vessel sailing from Turks Island, would not take any slave away. A slave was found on board his vessel after sailing for New York. G. filed his bill to be protected as surety and for a writ of *ne exeat*. Although the writ issued, it was, on motion, discharged.

June 23,
 1835.

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*Ne exeat.*  
*Surety.*

The complainant, George Gibbs Junior, resided in Turks Island, a territory belonging to the King of Great Britain; and the defendant Hypolite Mermaud was the master of the brig Felix, which had sailed from Turks Island for the port of New York.

It appeared by the bill that the complainant, as surety, with the defendant as principal, had executed a bond to the King of Great Britain, in the sum of one thousand pounds, conditioned that the said brig Felix should not, at her departure from Turks Island or from any other island or key within the British government, carry out any servant or slave, without leave of the master or owner or person having charge of the same first had and obtained in writing; That she had on board a slave, who had obtained his liberty in the city of New York; That thereby the complainant had become liable as such surety; and that the defendant was about sailing in the brig from the port of New York to some port in Cape Breton, and did not intend to return to New York. Prayer, that the defendant might be decreed to exonerate the complainant as such surety, by paying into this court the amount of the debt incurred by the forfeiture of the bond for the security of the complainant or might be decreed to give him adequate security that the same should be paid and the complainant held harmless and indemnified; and for a writ of *ne exeat*.

The writ issued; and a motion was now made to discharge it. For this purpose, affidavits were read which showed that the slave had secreted himself on board the brig, and the defendant was not aware of his being in the vessel until she was at sea and when it was too late to return the slave.

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GIBBS  
v.  
MERMAUD.

Mr. *F. B. Cutting*, for the defendant.

Mr. *E. Paine*, for the complainant.

**THE VICE-CHANCELLOR** :—Upon the authority of the cases *June 24.* collected in 1 Hovenden's Supp. 352, (n. 3,) a writ of *ne exeat* can issue only where there is a money demand, as a debt due which can be verified positively by affidavit or in a matter of account upon belief as to the balance. A surety may have relief in this court, in some cases, against his principal, where the debt has become due, by compelling the principal to discharge the debt in exoneration of the surety. The cases of *Ranelagh v. Hayes*, 1 Vern. 189; *Antrobus v. Davidson*, 3 Meriv. 569, are to this effect: but how is the court to decree payment in this case? to whom is the payment to be made? and where is the creditor who is to receive it. Neither the king in person, nor the officers of his government can be compelled to come to this court for the money. Even if an effectual mode of relief could be devised, it does not follow, according to the English practice, that a writ of *ne exeat* is incidental to that relief. The parties are both subjects of the king of Great Britain; and the complainant must be satisfied if the same rules are applied which would govern the decision of this motion were they before an English court of chancery.

The motion to discharge the writ is therefore granted.

1835.

IN THE  
MATTER OF  
HOWE.

In the matter of HOWE, infants.

Where creditors apply for payment of their debts out of a fund and children are interested in it, a guardian ad litem will be appointed for them to appear before the master to scrutinize the creditors' claims and protect their rights.

Creditors applying to prove their debts against a testator's estate, are to be allowed all costs incident to it out of the fund.

Mode pursued by the master in taking proof from the creditors; note (a).

August 18,  
1835.

Practice.

Infant.

Debtor and  
Creditor.

Guardian ad  
litem.

Costs.

A sale of infant's real estate had taken place, for the purpose of paying debts; and the amount of the sale had been brought into court. Upon an application for an order of reference to a master to take proof of debts. THE VICE-CHANCELLOR considered there ought to be a guardian *ad litem* for the children, in order to protect them from improper charges by the creditors. The following order was entered:

*"It is ordered,* that it be referred to William Van Wyck, Esquire, one of the Masters of this Court, to take proof of the debts due by the said Jedediah Howe, deceased, and that the said Master do cause notice to be given daily for three weeks in one of the public newspapers published in the city of New York and once a week for three weeks in the state paper, for all creditors of the said intestate to come in before him and prove their respective debts and that he fix a peremptory day for that purpose; and such of them who shall not come in before the said Master and prove their debts by the time so to be limited are to be excluded from the benefit of this decree. And it is further ordered that C. E. Esquire, one of the solicitors of this court be and he is hereby appointed guardian *ad litem* for the said infants, to attend before the said Master in their behalf and protect their rights herein; and that the said Master do

report with all convenient speed—and all further directions are reserved until the coming in of the said report.”(a)

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 IN THE  
 MATTER OF  
 HOWE.

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Upon the coming in of the master's report, the guardian *ad litem* suggested, whether the creditors, who had obtained the reference, ought not to bear the whole of the costs of it; and cited Bennett's Master, 55, where he says, "Every creditor establishes his claim at his own expense." But THE VICE-CHANCELLOR decided that the fund in court must bear the expenses of the master, guardian *ad litem* and solicitor of the creditors.

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(a) A question arose before the master upon this reference as to the mode in which the creditors should prove their debts: when he adopted the course directed by the R. S. upon claims presented to an executor or administrator (2 R. S. 98, § 35.) "Upon any claim being presented against the estate of any deceased person, the executor or administrator may require satisfactory vouchers in support thereof and also the affidavit of the claimant that such claim is justly due, that no payments have been made thereon, and that there are no offsets against the same to the knowledge of such claimant." And it is presumed there can be no particular objection to this course in all general cases. It amounts to what is required in the English practice, except where the claim happens to be disputed; and then the creditor has to answer written interrogatories (settled by the master) or depose *vice voce* and witnesses must be examined: See *Bennett's Master*, 54.

1835.

WHITE  
v.  
MEDAY.

WHITE v. MEDAY and another, executors of LEISTNER,  
deceased.

No part of the ancient and well established jurisdiction of the court of Chancery can be destroyed by the assumption or grant of new powers by statute to courts of law; and it cannot be taken away, except by the express enactment of the legislature.

Although, by the Revised Statutes, the courts of law can take cognizance and do justice in cases of lost notes yet the jurisdiction of Chancery in the like cases is not gone or affected.

September 8,  
1835.

*Jurisdiction.*  
*Lost note.*  
*Statute.*

Bill for the recovery of the amount of a lost promissory note, given by John Christien Leistner to one James Andrews or order on the twentieth day of July one thousand eight hundred and thirty-one, payable in ninety days after date, for the sum of three hundred dollars. The note was endorsed, before it became due, by the said Andrews to the complainant. The endorsement was made in blank and for value received. The note was also handed, before it became due, to one Lewis Shallcross by the complainant, in order that Shallcross might procure the money on it for the complainant's benefit; and it was lost by Shallcross shortly before or after it fell due.

Several demands had been made of the executors of Leistner for payment of the amount with interest.

The evidence showed, the making of the note—and there was proof of his hand-writing to it; also, that the complainant came into the possession of it for value received: the loss of it; and that at the time of commencing suit, the amount of the note was due to the complainant. It appeared also that a bond of indemnity had been tendered.

The defendants, being executors, denied all knowledge of the existence of such a note. And they made two points against the complainant's bill: 1. That the complainant had a full and adequate remedy in the courts of law

and ought to have pursued his remedy there ; and 2. That the bond of indemnity offered and tendered by the complainant to the executors was not, in point of form, security or substance, such as the law required.

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WHITE  
v.  
MEDAY.

Mr. *Van Rensselaer*, for the complainant.

Mr. *Pinckney*, for the defendants.

**THE VICE-CHANCELLOR :—**The making of the note by the testator, its negociability and the endorsement over by Andrews, the payee, to the present complainant for a valuable consideration, with its subsequent loss while it was the property of the complainant, are facts established by the testimony in the cause beyond contradiction. The defence set up is that the demand is of legal cognizance and can as easily be proved in a suit at law as upon a bill in this court, no discovery from the defendants being necessary to support it ; and that, since the Revised Statutes, a resort to this court, for the purpose of compelling the defendants to pay the note upon receiving an indemnity, is entirely unnecessary—and hence it is contended this court ought not to entertain the bill.

Before the Revised Statutes, it was the settled law of this state (and such is the law in England) that the owner of a lost note could not recover upon it in an action at law, provided it were negotiable and endorsed so that, by possibility, it might get into the hands of a third person who would have a legal right to sue upon it : *Rowley v. Ball*, 3 Cowen, 303. ; *Mc. Nair v. Gilbert*, 3 Wend. 344. Being subject to a future liability, it was deemed unjust to render a judgment against a defendant unless the note could be produced or shown to be actually destroyed ; and the court could not render a conditional judgment or require the defendant to accept a bond or other security for his protection. Consequently, a complainant was driven into the court of chancery for relief where payment could be decreed conditionally and when the whole matter of indemnity and protection to the defendant could be regulated. In order to obviate the necessity of a resort to equity, provision has been made



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by the revised statutes to remedy the defect in courts of law. A plaintiff has now a right to recover in a suit at law upon a lost negotiable note or bill of exchange on proof of its contents and loss, provided he executes a bond in double the amount and with a certain condition, prescribed by the statute, with two sureties, to be approved by the court in which the trial is had; 2 R. S. 406. § 76. Thus courts of law are now just as competent to exercise the equitable power of taking security for the defendant's protection as the court of chancery; and upon such security being given, they are required to render judgment for the payment of the note.

The question then is: whether, as there is no longer any necessity for coming into the court of chancery to enforce the payment of lost notes, this court's jurisdiction is taken away or in any manner restricted or impaired?

There are many cases analagous in principle to show that this court is not to be ousted of its jurisdiction; and I think it is clear that what was an exclusive jurisdiction in this court before the statute is now merely a concurrent one. As a general rule, the extension of the jurisdiction of courts of law to cases which formerly were subjects of equitable jurisdiction exclusively, has not ousted the jurisdiction of courts of equity. Thus, when courts of law agreed to dispense with the necessity of a profert in pleading in a suit upon a bond where a bond was lost or could not be produced, Lord Thurlow held, that it would not take away the jurisdiction which had so long prevailed in equity of giving relief to the holder of a lost bond: *Atkinson v. Leonard*, 3 Br. C. C. 218; and see 5 Ves. 238; *Toulmin v. Price Ex party Greenway*, 6 Ves. 812; *Brownly v. Holland*, 7 Ves. 19. So, in *Wright v. Hunter*, 5 Ves. 792, Sir William Grant, M. R. held that, although actions between partners for a contribution had then become frequent, which was formerly always the subject of a bill, it did not affect the jurisdiction of the court of chancery in such cases; and in *Kemp v. Pryer*, 7 Ves. 249, Lord Eldon emphatically and significantly asks, upon what principle can it be said the ancient jurisdiction of this court is destroyed because courts of law now

very properly, perhaps, exercise that jurisdiction which they did not exercise forty years ago.

Again: in the subsequent case of *the East India Company v. Boddum*, 9 Ves. 463, Lord Eldon entertained a bill against the sureties in a lost bond and decreed payment upon an indemnity being given, although by the modern practice of dispensing with *proferat in curia*, a remedy might be had at law upon the bond: but he holds the jurisdiction of courts of equity to be much more convenient and supposes it to have been an exclusive jurisdiction, on the ground of an indemnity being required which courts of law were not familiar with and did not know how to manage. So it would seem, from Lord Eldon's observations in the case last cited and from what has fallen from Lord Hardwicke in *Walmsley v. Child*, 1 Ves. 341, on the effect of the statute of 9, and 10, Will. 3 ch. 17. § 3, that, although by that statute there is an extension of the jurisdiction of the courts of law so as to permit the holder of an inland bill of exchange, which he has lost, to recover the amount from the drawer, provided, upon the tender of sufficient security to indemnify the drawer he should refuse to give a new bill in the place of the one lost, yet that chancery retains its wonted jurisdiction as exercised in the time of Lord Nottingham, in *Tercese v. Geray*, Finch's R. 301.

It is true that the Revised Statutes have completely remedied the defect in our courts of law and rendered a resort to this court, in cases like the one in hand, unnecessary: yet the legislature have not, in terms, declared that courts of law shall have exclusive jurisdiction or that the jurisdiction of chancery shall cease. The maxim *cessante causa cessat effectus* cannot apply in a matter of this sort or where a jurisdiction is often concurrent in the different tribunals of the state; and I think the legislature have done no more, in this instance, than to vest the courts of law with a co-ordinate power. It by no means follows that, because courts of law are directed to assume a greater extent of power than they formerly exercised, the court of chancery is thereby deprived of jurisdiction over the same subject matter—a jurisdiction in cases of this sort based as well upon the accidental loss and destruction of written instruments which

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forms a ground of equitable relief of itself, as well as upon the inability of courts of law to afford redress upon proper terms, where the claim to redress would be entirely of legal cognizance.

I am satisfied this is the true principle to which the court should adhere, namely, that no part of its ancient and well established jurisdiction can be destroyed by the assumption or grant of new powers to courts of law ; and that it cannot be taken away, except by express enactment of the legislature. Although, in a case like the present, there is no necessity, since the statute, for coming into this court and a suit at law would answer a better purpose, being more expeditious and less expensive, yet it would, perhaps, be unwise even for the legislature to shut the doors of chancery against a suitor upon a lost note. Sometimes a discovery by bill may be necessary to aid the plaintiff in proving the contents of a lost note ; and when this court has jurisdiction for this one purpose, it had better retain it, in order, in a proper case, to give relief.

These are the views I entertain ; and I shall not turn the complainant over to seek redress elsewhere. But still, there is no good reason given and none I think can be assigned why the complainants did not pursue his remedy against the executors (the present defendants) in a court of law—as he did in the first instance against the testator in his lifetime where he suffered a non-pross in consequence of not furnishing security for costs. I am, therefore, disposed not to allow the complainant his costs of the present suit. The executors could not, in safety to themselves, have paid the amount claimed upon the *ex parte* proofs submitted for their inspection before this suit was instituted. They had no personal knowledge of the existence of the note or other information of the justice of the claim. Besides, the bond which was tendered for their indemnity appears not to have been so full as the statute requires. I cannot say they have unreasonably resisted or neglected the payment of this demand; and, consequently, they are within the equity of that provision in the statutes which exempts them and the property in their hands from the complainant's costs : 2 R. S. 90, § 41.

Decree : for the payment of the principal and interest of

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the note, to be computed by a master, upon the complainant executing a bond of indemnity pursuant to the statute and to be approved of by the same master.

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SAUNDERS  
v.  
SAUNDERS.

SAUNDERS, by her next friend v. SAUNDERS.

Wife filed a bill for divorce *a mensa et thoro*; and applied for temporary alimony and money to carry on suit. Opposed, on the ground of her habitual drunkenness and having \$2 a week allowed her by the husband. Reference ordered to ascertain whether \$2 a week was enough and whether she could be entrusted with money.

Bill by wife for divorce *a mensa et thoro*, who now applied for temporary alimony and an advance to carry on the suit. Affidavits in opposition, showing habitual drunkenness and an arrangement between the parties that the wife should live apart from the husband and be allowed two dollars a week.

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*Practice.  
Divorce.  
Temporary  
alimony.*

Mr. *H. M. Western*, for the applicant.

Mr. *F. B. Cutting*, for the defendant.

**THE VICE-CHANCELLOR:**—The bill charges ill-treatment, by turning the wife out of doors. It appears that the husband caused a notice to be served upon the wife warning her not to enter his house. These parties have brought up a family; and nothing appears to have occurred for some years. But now the wife, who files the bill, has become grossly intemperate—is a common drunkard. This plainly appears from the opposing affidavits. I do not consider it correct, on the part of the husband, to have served the notice he has done. Still, I cannot overlook the drunkenness of the wife. It may not be safe to entrust her with money for board, because she may apply it to a very different purpose; and it may be that the two dollars a week allowed by the husband is sufficient under the circumstances.

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Let a reference be had to Master Cambreleng, to ascertain whether two dollars a week is a suitable allowance or what sum is proper to be advanced for the support of the complainant pending this suit; and whether she is fit to be entrusted with the money and would be likely to make a proper use of it for her support. All further directions—including the question of an advance to her solicitor—are reserved until the coming in of the report.

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CHASE v. BYRNE.

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Where notes are taken in satisfaction of a judgment, the debtor giving them must prove affirmatively not only delivery and acceptance, but also an agreement to receive them in payment and to run the risk of their goodness—otherwise he cannot set up a plea of accord and satisfaction.

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1835.

*Accord and  
satisfaction.*

Judgment creditor's bill. Plea, accord and satisfaction. It appeared by the testimony taken under the issue upon the plea that on the judgment being had, the attorney agreed to take good business paper and goods in payment and settlement of the debt. Certain notes and goods were accordingly received: but the notes turned out to be worthless. There was evidence which went to negative an intention of taking the notes as cash.

Mr. *J. Taylor* and Mr. *Selden*, in support of the plea.

Mr. *D. D. Field*, for the complainant.

**THE VICE-CHANCELLOR :—**This is a judgment-creditor's bill and to which the defendant has pleaded in bar an accord and satisfaction, by the delivery of three several promissory notes of third persons and some goods. Issue is joined upon

the plea ; and the cause is before the court upon the question of fact presented by it.

Notes and goods were delivered by the defendant to the complainant's solicitor to the amount of the judgment : but the notes were not paid at maturity and the makers of them have proved insolvent. The question is, whether the complainant received the notes in payment and satisfaction of the judgment absolutely or only by way of security and to be a satisfaction of the judgment only when paid.

The rule of law is that a note or bill taken for a precedent debt, which turns out to be bad, is no payment, unless the creditor expressly agrees to receive it as payment and run the risk of its goodness : *Tobey v. Barber*, 5 J. R. 68 ; *Johnson v. Weed*, 9 Ib. 311 ; *Whitbeck v. Van Ness*, 11 Ib. 414 ; *Hardin v. Kretsinger*, 17 Ib. 295 ; *Muldon v. Whitlock*, 1 Cowen, 306. The judgment in this case was a pre-existing debt, and to support the plea it is incumbent on the defendant to prove affirmatively, not only the delivery of the notes and the acceptance of them by the complainant or his solicitor or attorney, but also an agreement to the effect just mentioned. The defendant's testimony certainly fails to prove this ; and it goes no further than to show the notes were delivered in "settlement" of the judgment. This might be—and still not operate as an absolute payment and satisfaction. The circumstances attending the case, the course of the transaction and the testimony of the witnesses go to show there could not have been such an agreement or understanding in relation to the taking of the notes.

The plea is not supported ; and the complainant is entitled to a decree for the payment of his judgment out of any estate or property of the defendant which can be discovered.

As the defendant has died since the hearing, a decree may be entered as of a day anterior to his death.

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 HAY  
 v.  
 POWER.

## HAY v. POWER and another.

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A defendant who has obtained an order for a non resident complainant to give security for costs, should move to dismiss the bill where delay arises in giving the security ; and not continue. on his part, by putting in answer and placing the cause on the calendar: for this will be virtually waiving his order for costs and debar him from the motion to dismiss.

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Sept. 14,  
 1835.

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*Plea.  
 Practice.  
 Waiver of  
 the effect of  
 an order.*

Complainant was a non-resident ; and an order was obtained by the defendants requiring security for costs and that all proceedings on his part in the meantime be stayed. This did not stay the defendants, and they put in their answer, and placed the cause upon the calendar on bill and answer, refusing to receive a replication. The defendants now moved to dismiss the bill, on the ground of the order for security for costs not having been complied with—this order was obtained on the ninth day of December one thousand eight hundred and thirty-four.

Mr. J. Blunt, for the motion.

Mr. F. Dibblee, in opposition.

THE VICE-CHANCELLOR:—I consider the setting down of the cause by the defendants a waiver, in effect, of the order for security. If the defendants had wished to have the benefit of that order, he should have moved to dismiss for non-compliance with it without setting down the case for hearing upon the merits. The former course would have been proper: *Camac v. Grant*, 1 Sim. 348. There was no condition or proviso in his notice of hearing to save to himself the benefit of the order. The calendar, upon which the cause stands, has been called and thus the defendant has had an opportunity of bringing on the cause according to his notice and cannot complain of delay

on this score. The cases most analagous on the subject of waiver are *Morgan v. Morgan*, 1 Atk. 53; *Hall v. Chapman*, Dick. 348; *Dixon v. Olmins*, 1 Cox, 412, and *Hoskins v. Lloyd*, 1 S. & S. 393.

The motion must be denied, but the costs may abide the event of the suit.

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v  
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C., by her will, directed her property to be converted into money and invested at interest; and, after giving legacies, ordered as follows: "that all such residue of said interest money or other profits as there shall be, after such payments as above mentioned, be equally divided among my children or the survivor or survivors of such as shall die childless yearly and every year share and share alike during their natural lives; and that if either of my said children shall die leaving a child or children, then the part or share of which the parent of such child or children was receiving the interest during his life shall immediately vest in and be the property of such his child or children as shall be living at his death." Held, that this did not come within the provision of the Revised Statutes (1 R. S. 773. § 1.) providing against the suspension of ownership of personal property for a longer period than two lives; and that the clause was good.


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Mrs. Cromwell died, leaving personal property only, amounting to about ten thousand dollars. She had made her will, bearing date the fourteenth day of May one thousand eight hundred and thirty. Her death happened in the month of February one thousand eight hundred and thirty-three. By her will, after directing all her property to be sold and converted into money by the executors and the money to be put out at interest, she ordered some small legacies and annuities to be paid out of such interest and then directed (taking the words of the will) "that all such residue of said interest money or other profits as there shall be after such payments as above mentioned be equally divided among my children or the survivor or survivors of such as shall die childless yearly and every year share and share alike, during their natural lives; and that if either of my said children shall die leaving a child or children, then the part or share of which the parent of such child or children

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Will.



1835.  was receiving the interest during his life shall immediately vest in and be the property of such his child or children as shall be living at his death."

CROMWELL  
v.

CROMWELL. The testatrix left three sons, who were the parties to this suit. The two made defendants were appointed executors; and had proved the will and held the property upon the trusts specified in it. The complainant was unmarried; and he filed his bill for the purpose of avoiding the limitations over to the survivors and survivor and to their child or children in the event of their leaving any—and prayed for an immediate distribution of the whole residue among the three sons absolutely: upon the ground that such limitations over were void in law.

Mr. *W. K. Thorn*, for the complainant.

Mr *C. T. Cromwell*, for the defendants.

*October 5.* THE VICE-CHANCELLOR:—The Revised Statutes, which were in force when this will was made and took effect, provide "that the absolute ownership of personal property shall not be suspended by any limitation or condition whatever for a longer period than during the continuance and until the determination of not more than two lives in being at the date of the instrument containing such limitation or condition or if such instrument be a will for not more than two lives in being at the death of the testator": 1 R. S. 773, § 1.

The question is: whether this case comes within the section just quoted? Is there, by this will, a suspension of the absolute ownership beyond the lives of two persons in being at the death of the testatrix?

If the will bequeath the property to the executors in trust or convert it into a trust fund in the hands of the executors for the benefit of the three sons for life in joint tenancy, creating but one estate or interest in the whole fund and preventing a partage or division until the termination of all three of the lives and, in the meantime, the interest of persons who are to take in remainder be contingent, then, ac-

cording to the opinion of the Chancellor, in *Lorillard v. Coster*, the whole trust would be void. But I think the present is not such a case. According to my understanding of the will in question, the property is given in several undivided third parts. The three sons take as tenants in common for life, with benefit of survivorship in the event of either dying without issue—the issue surviving the parent to take his share. In this way the absolute ownership in each share or third, considered distinctly, is not suspended for three lives. It is only suspended in fact for one life, for upon the death of any one of the first takers, his share vests in the survivors or survivor or in the deceased first taker's child or children. It is not a case, therefore, within the statute. In *Lorillard v. Coster*, the chancellor made a similar distinction—and it is sound.

It is the duty of the court to give effect to the whole will, unless some part or parts of it are clearly against the provisions of the statute or the policy of the law. The will can be supported; and the complainant's bill must be dismissed, with costs.

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WARRNER  
v.  
DYETT,

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WARNER v. DYETT and wife and another.

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Although a husband releases all interest in the wife's trust estate, yet he cannot be a witness for her in relation to it.  
The rule which excludes the husband and wife from giving evidence for or against each other is inflexible.

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Bill brought to obtain the liquidation and payment of cer- October 12,  
tain claims made by the complainant, for services rendered 1835.  
and monies disbursed by him chiefly as solicitor, attorney Husband  
and counsel for and in behalf of a trust estate under mar- and wife.  
riage articles made between the defendants, Joshua Dyett Witness.  
and Jessy Ann his wife. The bill had been taken *pro con-*  
*fessa*; and an order was entered referring the matter to a  
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master to take and state an account. A consent was signed by the complainant, allowing the defendants to go into proofs as if the cause had been at issue. The husband, Joshua Dyett, was offered as a witness on the part of the wife; and a release from him of all interest in the trust estate, was produced: but the witness was objected to by the complainant. A petition was now presented to the court, asking that the master might take the testimony of the said Joshua Dyett, so far as related to the trust estate.

*Mr. D. Selden*, for the petitioner.

*Mr. H. Warner*, in *pro per*.

**THE VICE-CHANCELLOR:**—The present petition is objected to upon two grounds: 1st, on account of interest; and 2nd, that the policy of the law is against it.

As to the first point:—This is attempted to be obviated by the release made by Joshua Dyett. Still, this may not entirely remove it. I do not mean to pass upon the effect of the instrument; but the husband is bound to support his wife; and he may, therefore, in the present case be said to have an interest in protecting the trust estate, (out of which she gets maintenance)—as this will relieve him personally from her support. But—without placing particular stress upon this point—I consider the second as sufficient.

2. The rule which does not allow the wife to be a witness against the husband, is founded upon the relationship between the parties; and the interference which such examination would cause might trench upon this relation. The law has, for wise purposes, made the rule; and it is inflexible. It has not been deviated from, save in some criminal cases where the wife makes a charge against the husband—and there from necessity. And the same may be said as to the husband's being a witness for or against the wife—besides, it might encourage perjury.

The case of *Davis v. Dinwoody*, 4 T. R. 678, is, perhaps, the only one which need be here mentioned. It was an action by the executrix of a surviving trustee under a marriage settlement, to recover the value of certain goods sold by

the defendant, as sheriff, under an execution against the husband of the *cestui que trust*. There, it was held that the husband was not competent to prove, on the part of the plaintiff, that the goods had been conveyed to the plaintiff in trust for the separate use of the witness's wife. Lord Kenyon put the decision upon the ground of the nearness of connection, which naturally existed between man and wife, whereby a strong bias might be supposed to exist. This case is in point.

I put my decision mainly upon this ground.—The motion must be denied.

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BURREAS  
v.  
LOOKER.

BURREAS v. LOOKER and others.

Where a public administrator, who is a defendant in a suit, has resigned or is removed, from office the complainant may apply to substitute the succeeding public administrator and enter an order to that effect and then insert his name in the title of the suit and in the subsequent proceedings; and such last administrator may, if he thinks proper, apply to amend the former proceedings or to file a new answer and open the proofs, &c.

Alpheus Sherman, as public administrator, had been made a defendant. He was afterwards removed; and a petition, on the part of the complainant, was now presented, to substitute the name of Eber Wheaton, the present public administrator, in the place of Alpheus Sherman, as a defendant.

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1835.  
Practice.  
Public administrator.  
Party.

Mr. Silliman, for the motion.

Mr. A. Nash, contra.

THE VICE-CHANCELLOR:—By the Revised Statutes, vol. 2, p. 125, § 34, no suit that shall have been commenced by the public administrator shall abate, on account of his authority having ceased, for any cause; but the same may be continued by his successor or the executors or adminis-

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 BURRAS  
 v.  
 LOOKER.

trators of the deceased, who shall succeed him in the administration of the estate in relation to which such suit shall be brought.

This section does not apply in terms where a suit is brought against a public administrator. But if the suit does not abate when brought by him, it surely ought not to abate when brought against him. Even if his authority ceases by death, the suit is to go on by suggesting the death and having an order to continue it in the name of the successor.

Another part of the statute provides for the case of suits by public officers or trustees appointed by statute where they shall die or be removed, such death or removal shall not abate the suit, but the same may be continued by the successor who shall be substituted for that purpose by the court: *Ib.* 388, § 14.

Again: in relation to suits commenced by or against executors or administrators generally, they are not to abate by death or removal, &c. but may be continued in the one case by and in the name of the person who shall succeed the executor or administrator so dying or removed, &c. and in the other, the court in which the suit may be depending, on the application of the plaintiff therein and after reasonable notice to the person succeeding to the administration of the same estate may, by a rule of court, substitute the person so succeeding as defendant; and the suit shall thereafter proceed as if it had been originally commenced against the person so substituted: *Ib.* 115, § 14, 15, 16, 17.

These different provisions contain a principle which is applicable to the present motion: but I am inclined to think the public administrator is embraced in the very letter of the statute—and if not, he is certainly within the spirit of the regulations concerning suits by and against executors and administrators just quoted.

It is fit and proper that the succeeding public administrator should be substituted, because the former one, on resignation or removal, is to deliver over all papers, money and effects in his hands to his successor: *Ib.* 128, § 44. He thereby relinquishes all control of any business appertaining to the office; and he ought to have no objection to be discharged from the suit.

I am of opinion it is the proper course, upon a plaintiff's application, to substitute the present public administrator in the place of the former, merely by entering an order to that effect and, during the subsequent proceedings, in the title of the cause and otherwise, to insert the name of Eber Wheaton as such public administrator instead of Alpheus Sherman. When Mr. Wheaton is thus made the party, by serving him with a copy of the order of substitution, he will have an opportunity of making any application he may think proper to amend the former proceedings or for leave to file a new answer and to open the proofs or for any purpose which the interests of those whom he represents may seem to require.

Motion on the present petition granted.



SMITH and others v. CROCHERON.

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SMITH  
v.  
CROCHERON.

A defendant, in answering a judgment creditor's bill, has a right to set up the fact that a writ of error has been brought to reverse the judgment; as well as circumstances to show that a judgment ought not equitably to have been obtained.

Exceptions to an answer for impertinence.

The bill had been filed by the complainants as judgment creditors after an execution at law was returned unsatisfied.

The following matter was excepted to as impertinent.

(First exception.) "But this defendant denies that the amount of said judgment is equitably due to said complainants, as in said bill is alleged; and says that the said suit was commenced, and the said judgment was obtained by the said Robert Mc. Jimsey in violation of an agreement made with this defendant, by this defendant's creditors, and more particularly by the said Alexander C. Jackson, on behalf of himself and the said Robert Mc. Jimsey, to

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nence.

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compromise the debts which this defendant owed to the said creditors respectively upon securing and paying to them respectively a certain per centum of the amount due to said creditors from this defendant. And that after this defendant had, in pursuance of the aforesaid agreement, assigned and divested himself of his property, to obtain the security and to pay to said creditors the amount so agreed upon and after nearly all the creditors of this defendant had discharged their claims against him and upon being secured and paid the amount so agreed upon, the said Robert Mc. Jimsey, in violation of said agreement, "fraudulently commenced the said suit and obtained the said judgment. And this defendant further says that previous, to making said agreement, he having met with very heavy losses in business and his remaining property being wholly insufficient to pay his debts, and this well known to his creditors and this defendant being about to apply for a discharge from his debts under the insolvent laws of this State, and a number of his creditors, more than sufficient for that purpose, being willing to unite with him, in a petition for a discharge under said insolvent laws, this defendant, at the urgent request of the said Alexander C. Jackson acting for himself and the said Robert Mc. Jimsey, agreed to abandon said proceedings and to secure and pay to his said creditors, by the promissory notes of Frazee Ayers and Caleb C. Tunis and of this defendant a certain per centage of the amount of their claim amounting, in the aggregate, to the whole estimated value of all this defendant's remaining property; and a number of the said creditors, including said Jackson and Mc. Jimsey, having, upon the like solicitation of the said Jackson, agreed to receive the same, in full satisfaction of their said claims—and the said Jackson and Mc. Jimsey and the said other creditors thereupon signed their names to an agreement in writing to that effect. But the said Jackson and Mc. Jimsey, though frequently requested to make up their account against this defendant, neglected to do so; and under various pretences deferred the settlement of their own claims against this defendant under said agreement until after this defendant had settled with and received discharges from so many of

his creditors that this defendant could not, by the aid of his remaining creditors, obtain the benefit of said insolvent laws in opposition to the claims of said Jackson and Mc. Jimsey ; and then the said Jackson and Mc. Jimsey set up a fictitious claim against this defendant of several thousand dollars more than was due to them—as was fully proved in the trial of the said suit in the Superior Court, and demanded of this defendant, by their clerk, the per centage agreed to be paid by this defendant upon the whole amount of the claim so set up by them. That this defendant was, at that time, the endorser of the said Jackson and Mc. Jimsey's notes to the amount of several thousand dollars, which were not then due ; and this defendant knew that said Jackson and Mc. Jimsey were in failing circumstances and if they failed before said notes were paid that this defendant would be liable for the payment thereof and therefore this defendant, when the clerk so called upon him, desired to see the said Jackson and Mc. Jimsey before he paid or delivered the notes for said per centage ; that said Jackson and Mc. Jimsey failed the next day and were unable to pay, as this defendant has heard and believes, more than ten cents in the dollar of their debts ; that said Jackson shortly afterwards departed this life and the said Robert Mc. Jimsey (though this defendant, for the sake of settlement, repeatedly afterwards offered to pay to him the per centage agreed upon on the whole amount of his demand, including said fictitious claim) refused to accept the same and commenced the said suit and, as this defendant is informed by his counsel and believes, against law and against equity, obtained said judgment. And this defendant further says that he has caused a writ of error to be brought upon the said judgment to reverse the same, which writ of error is still pending undetermined."

(Second exception.) "And this defendant further says, that at the time of his said failure, he was the indorser, as hereinbefore mentioned, of several promissory notes of the said Jackson and M'Jimsey, who also failed before the said notes become due, leaving the said notes so indorsed by this defendant unpaid and which, being protested for non-payment, this defendant became liable to

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“pay as the endorser thereof; that after the said Jackson and M'Jimsey had refused to accede to said compromise, and after said notes had been so protested, and before the commencement of the said suit in the Superior Court, this defendant, under the advice of counsel, paid for the said Jackson and M'Jimsey, to the holders of said notes, as a consideration for his discharge as the endorser thereof, a sum of money equivalent to what he was obligated to pay said Jackson and M'Jimsey, under said agreement for a compromise.”

Mr. *J. Hoyt*, for the complainant and in support of the exceptions.

Mr. *John Wallis*, for the defendant.

April 11,  
 1836.

THE VICE-CHANCELLOR:—The matter of the first exception or the greater portion of it would seem to be responsive to that part of the bill which alleges the judgment to be justly and equitably due and, therefore, is not to be considered impertinent. At any rate, the defendant has a right to set up the fact that he has brought a writ of error to reverse the judgment which is still pending. It may be material to his defence or to give the defendant a right to file a cross-bill for his relief, provided he should succeed, (while this bill is pending) in reversing the judgment. The first exception covers this averment in the answer and if all the other parts of the exception should be well taken, it must, as to this, be deemed too broad and of course be disallowed.

As to the second exception: I consider the master has decided correctly in likewise disallowing it. This exception depends upon the same principle as the last. Those parts of the answer which set up the composition-agreement and show that the judgment ought not to have been recovered, cannot, at this time, be passed upon as immaterial or improper. The complainants come here asking for equitable interference and the recovery of a debt. If they have not done equity they must not ask it. Applying the test as to what is impertinent in pleading (1. Hoffman's Pract. 283.)

and I think the exceptions to the answer were properly disallowed.

Order, overruling exceptions to the master's report, with costs.

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SHIRLEY, executrix, &c. of Shirley, deceased v. THE  
CONGRESS STEAM SUGAR REFINERY and another.

Where the mere personal security of the purchaser has been taken on a sale of land, the rule is, as between vendor and purchaser, to sustain the implied lien for the unpaid purchase money; and to consider any bond, note or covenant given by him alone as intended only to countervail the receipt for the purchase money contained in the deed and to show the time and manner in which the payment is to be made—unless there be an express or manifest agreement to waive such lien. And, on the other hand, generally to consider the implied lien as waived, whenever security is taken on the land for the whole or any part of the purchase money or whenever the security of a third person is given.

The mere taking a promissory note from the purchaser long subsequent to the conveyance will not waive the implied lien; and it rests upon the purchaser to prove it was intended as a waiver.

A mortgagee, however, who advances his money without a knowledge of the way in which the purchaser bought, will gain a priority over the seller's lien.

In the present case, the purchasers formed a company and gave their note for part of the consideration, and then became insolvent and conveyed the property to an assignee for the benefit of creditors: *Held* that this assignee stood merely in the place of the late purchasers and that the conveyance to him did not supersede the lien of the seller.

Bill to have a promissory note, given as part of the purchase money for an estate, declared an equitable lien upon the property.

January,  
1836.

Stephen Shirley, in the month of September, one thousand eight hundred and thirty-one, sold a house and lot, known as No. 140 Duane Street in the city of New York, to the defendants the Congress Steam Sugar Refining Company. The house and lot were conveyed to the company by Shirley; but only a small part of the purchase money was paid and no mortgage had been given, although the bill alleged that it was part of the terms of the purchase that one should be given.

*Equitable  
lien.  
Vendor and  
purchaser.*

In the month of July, one thousand eight hundred and

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thirty-two, Stephen Shirley was about quitting the city of New York, on account of the prevalence of the cholera, and then an account was made out by the officers of the company, showing the balance due to Shirley, and the Treasurer and Secretary made out a promissory note for such balance and handed it to Mr. Shirley. It ran thus :

“ Congress Steam Sugar Refinery.

“ New York July 26, 1832.

\$2,000. “ One year after date, the Congress Steam Sugar Refinery promises to pay to the order of Mr. J. Shirley, the sum of two thousand dollars, for value received. “ Truman Bibby, “ For the Refinery.

Secretary.”

“ J. Delafield,”  
 Treasurer.”

Stephen Shirley made his will ; and, died. He appointed the present complainants his executrix and executor. Three hundred dollars had been paid to them by the treasurer of the company, Mr. Delafield, and the same was endorsed upon the promissory note.

In the month of October, one thousand eight hundred and thirty-one, the Congress Steam Sugar Refinery mortgaged the said house and lot, with other adjoining property, to the executors of Augustine Hicks Lawrence, deceased, for securing ten thousand dollars and interest.

On the twenty-second day of July, in the year one thousand eight hundred and thirty-three, the Congress Steam Sugar Refinery made an assignment of all their property to the defendant, Cornelius Dubois Junr., for the benefit of their creditors—giving him the usual power to sell and convey. Soon afterwards, the complainants learned that one Samuel Guppy was in treaty for the purchase of the said house and lot, and adjoining property ; and, as it was deemed beneficial for all parties, an arrangement was made whereby the property was to be sold, and Mr. Dubois was to deposit a certain portion of the purchase money in the New York Life Insurance and Trust Company ; and the same was to remain there until the claim of the complainants was passed upon by this court. These complainants prayed that the court would decree an equitable lien upon the money for the amount remaining due their testator upon the purchase

chasers for valuable consideration. There is certainly a of the lot by the company, together with interest and costs.

The cause came up on bill, answer and proofs.

Mr. *P. J. Fish*, for the complainants.

Mr. *Van Winkle* and Mr. *Dubois*, for the defendants.

THE VICE CHANCELLOR:—As between vendor and purchaser, the rule is, to sustain the implied lien for the purchase money where the mere personal security of the purchaser has been taken; and to consider any bond, note or covenant given by him alone as intended only to countervail the receipt for the purchase money contained in the deed and to show the time and manner in which the payment is to be made—unless there be an express or manifest agreement to waive such lien. And, on the other hand, to consider the implied lien as waived, whenever security is taken on the land for the whole or any part of the purchase money or whenever the security of a third person is given (except, perhaps, in the single instance of a bill of exchange drawn upon a third person, as supposed in *Hughes v. Kearney*, 1 Sch. & L. 136, and as was the case in *Grant v. Mills*, 2 V. & Beames, 306 :) unless there be an express agreement that the equitable or implied lien shall be retained: *Fish v. Howland*, 1 Paige's C. R. 20; *Blunt's Ambler*, 723, (n. 1.) where the English authorities are collected and arranged and these rules are extracted—see also 4 Kent's Com. 146, and cases there cited.

In the case now presented, there is no evidence of any express agreement or understanding, either at the time of the sale or afterwards, that the defendant Shirley should relinquish his right to look to the property for the payment of the purchase money. He took no collateral security of a third person, and there was no express charge or incumbrance upon the land itself, although, by the contract, a mortgage was to have been executed to him. His equitable lien, therefore, attached. Nor was it waived, according to the principle just stated, merely by taking the promissory note of the purchasers long subsequently to the purchase.

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That circumstance is not enough to operate as a waiver ; and if there were any agreement or understanding by which the lien was waived, the defendants are bound to prove it. For these reasons, the lien must be deemed to have existed as against the Congress Steam Sugar Refinery. But it became subordinate to the mortgage given by the company to the executors of A. H. Lawrence upon this and other lots, because they took their mortgage upon the strength of the legal title in the company, and without notice of the equity in favor of their vendor.

The next question then is, and it is the important one: whether this equitable lien for the unpaid purchase money remains as against the defendant Dubois, who claims under a deed of conveyance from the company to him, in trust for the benefit of creditors ? This conveyance or assignment may be called a voluntary one, similar, in all respects, to an assignment of an insolvent's estate by operation of law. It is not, however, a voluntary assignment, without consideration, and liable to be set aside as fraudulent. There is a sufficient consideration to support it in law, namely, the antecedent debts owing by the company, which it is intended to secure and pay as far as the property assigned will extend. But it is not pretended there is any other consideration—no fresh advances of money, no new sale and delivery of goods by Mr. Dubois or any of the creditors to induce the making of the assignment. Nor do I understand it was founded upon or connected with any composition-agreement or stipulation on the part of the creditors to accept of its provisions in satisfaction of their demands or that they have relinquished any legal rights against the company in consequence of the assignment. The company have merely placed the property in trust for the benefit of their creditors by this voluntary act on their part, although, by the acceptance of the trust, the title may have passed and vested in the trustee without the express assent or concurrence of the creditors or their becoming parties to the instrument: *Cunningham v. Freeborn*, 11 Wend. 241. Under such circumstances, it appears to me, neither the assignee nor the creditors stands in a situation to claim the rights of actual pur-

wide difference between persons who have acquired legal rights in this way, and those who contract, in the first instance, for the purchase of property and, upon the strength of a conveyance to be made to them, pay their money or part with their goods. In the latter case, they are purchasers in every sense of the word; and when they act in good faith, without notice of any prior equitable lien or incumbrance, they acquire a title which cannot be affected by any such claims. In order to produce this exemption, however, the title should be founded upon a present moving consideration, not upon a past one—such as an antecedent debt, especially where the party does not release the debt but retains it and takes a conveyance or assignment of property not as absolute payment in the first instance, but to be applied in payment when the money shall be realized from it. How, then, can the equitable lien of the original vendor be defeated by such a transfer of the property?

This question has certainly been passed upon in this court in the matter of *Howe*, 1 Paige's C. R. 128; and the case itself called for a decision upon the point. There, *Howe*, the petitioner, had equitable rights in respect to land against *Tompkins*, who had made a general assignment for the benefit of his creditors and judgments also had been recovered against *Tompkins*; and the question arose, whether *Howe* was divested of his equity by the assignment or by the recovery of the judgment? The chancellor held it to be a well settled rule of equity that the general assignees of a bankrupt take the estate subject to every equitable existing claim of third persons and cannot avail themselves of the legal estate thus acquired to defeat a prior equity; although they have no notice of it at the time of the assignment. In this respect, he observes, assignees differ from *bona fide* purchasers of the legal estate and from mortgagees who have advanced their money on the credit of the land. And no good reason can be perceived why a different rule should be applied in favor of general assignees for the benefit of all the creditors from that which prevails in respect to those created by operation of law. Neither could be considered as *bona fide* purchasers. *Sir Simeon Stuart's case*, to which reference is had, supports the doctrine as equally applicable

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to trustees for the benefit of creditors under a conveyance made by the debtor as to assignees in bankruptcy. But the chancellor intimates, and I think, very correctly, that the case might be different where creditors, without notice of the prior equity, had released their debts in consideration of an assignment made to trustees for their benefit.

In *Warner v. Alestyne*, 3 Paige's C. R. 513, the lien of the vendor for a balance of the purchase money was sustained, not only against the heirs of the vendee but against the widow in respect to her dower, inasmuch as she takes her dower by operation of law and not as a purchaser from her husband for a valuable consideration.

It is true that no express adjudication of the English courts is to be met with upon the precise point that a lien for purchase money shall be preferred to a trust for creditors created by the voluntary assignment or conveyance from the purchaser; and, probably, for the reason that the operation of their bankrupt laws have put a stop to the practice of making such assignments, so that questions of this sort can, very rarely, if ever, arise. Yet there is good authority for believing that the law is so understood to be settled in England. Sugden, the distinguished author of the treatise on the law of Vendors and Purchasers (now in its ninth edition,) after laying down the rule that persons coming in under the purchaser by act of law, as assignees of a bankrupt, are bound by an equitable lien, although they had no notice of its existence: because, the assignment, by operation of law, passes the rights of a bankrupt precisely in the same plight and condition as he possessed them, observes "and the creditors claiming under a conveyance from the purchaser are bound in like manner as assignees, because they stand in the same situation as creditors under a commission:" 2 vol 74, 75. And in *Fawell v. Heelis*, Ambl. 723, Earl Bathurst acknowledged the rule to be that the equitable lien for purchase money, where the seller has not waived it by taking other security, is good not only against the purchaser, but against his creditors, whether under a commission or under a deed of trust in the nature of a commission. It is certain, he says, that persons claiming under such a deed stand in the same situation as creditors under a com-

mission. The Lord Chancellor's opinion, however, was that the seller, in the case before him, had waived the lien by giving a receipt on the back of the deed for the purchase money and accepting bonds from the purchaser for the amount—a doctrine since overruled. But had he considered the lien as existing, there can be no doubt he would have held it good against the creditors of the purchaser who, becoming insolvent, had conveyed the estate in trust for their benefit. A different opinion appears, nevertheless, to have prevailed in the Supreme Court of the United States in *Bayley v. Greenleaf*, 7 Wheaton, 46. Chief Justice Marshall, in delivering the opinion of the court, considers that the vendor's lien cannot be asserted against creditors holding under a *bona fide* conveyance from the vendee; and doubts whether it is settled in England that the lien remains against the assignees of a bankrupt or creditors coming in under the purchaser by act or operation of law. Had the learned Chief Justice gone a little further and looked into some later cases—particularly *Grant v. Mills* before mentioned and *Ex parte Peake*, 1 Mad. C. R. 346, (for these do not appear to have fallen under his observation)—it is probable his doubts upon the point would have been removed. In the first of these cases, Sir Wm. Grant, M. R. treats it, as a settled rule, not liable to be disputed, that whatever equity the vendor would have against the purchaser, he is entitled to against his assignees: and in the last case, where the question was between the vendor and the assignee and creditors of a bankrupt vendee, Sir Thomas Plumer, V. C., after showing that an equitable lien existed without a special agreement to extinguish it, lays it down to be equally clear that the right of lien applies also, where the vendee becomes bankrupt, against his assignee: they being in no better condition than the bankrupt himself.

The Chief Justice, however, in the case before referred to, remarks that were it completely settled that the vendor should retain his lien against the assignees of a bankrupt, it would not follow he would be entitled to it against creditors holding under a *bona fide* conveyance from the vendee; and he considers it to be inconsistent with the principles of equity and with the general spirit of our laws that such a lien should be

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set up in a court of chancery to the exclusion of *bona fide* creditors. The reasons given for this conclusion are very concisely stated; and if by "*bona fide* creditors", creditors at large are meant, who have paid no present consideration and given up no present right in order to obtain a conveyance of the debtor's property, I, for one, must beg leave to dissent: for, upon no principle consistent with our laws, can the doctrine, in my opinion, as to creditors in this situation be supported. It would be to confound all distinction, which I think clearly exists, as has been already observed, between them and actual purchasers for valuable consideration without notice and to put the rights of such creditors, having claims only for antecedent debts, upon the same footing as though they had made fresh advances of money or goods or parted with some right upon the strength of the conveyance. If creditors have acquired rights in either of the last mentioned ways, in good faith and without notice of a prior equitable lien or trust, I agree it ought not to be supported to their prejudice; and I cannot help thinking that the reasons assigned, in the opinion of the late Chief Justice and the principles there stated, were intended to apply solely to a case of the latter description. It does not distinctly appear, from the report of *Bayley v. Greenleaf*, that it was not a case of this sort; but enough appears to authorize an inference, at least, that the creditor, for whose benefit and security the conveyance in the first instance was made, was not a mere volunteer. He had entered into engagements for Greenleaf, the plaintiff's vendee, to a large amount and the deed was made to secure these and also to secure the creditor for any further advances he might make or future engagements he might enter into on account of Greenleaf. The creditor, therefore, may have made further advances and incurred subsequent liabilities on the credit of the security; and if so, he was a mortgagee, as he appears to have been considered, not merely for an antecedently contracted debt but also in consideration of fresh advances and liabilities. Under such circumstances, without notice of the prior lien claimed by the vendor for purchase money, the right of the mortgagor might well be preferred. But supposing these particular

considerations not to have entered into the case of *Bayley v. Greenleaf*, and the decision to have proceeded upon the broader ground which would seem to be covered by the opinion delivered, it is not, I apprehend, to be implicitly followed as a binding authority in this court; and where the court has already established, as I think it has, a different rule, such decision cannot have the effect of disturbing it.

There are, indeed, a variety of instances in which the Federal courts, instead of overruling and undertaking to control the decisions of the state courts, submit to follow and be governed by the rules and principles which they establish: *Jackson ex dem. St. John v. Chew*, 12 Wheaton, 153.

I shall adhere to the rule as laid down *In re Howe*; and decree the lien to be a valid and subsisting one against the assignee and the creditors of the company. There is no difficulty about fastening this lien to the fund in the hands of the defendant Dubois, although it is not entirely the proceeds of the lot sold by the testator Shirley. As between the parties to this suit, the mortgage given to the executors of Lawrence must be deemed to have been satisfied out of the other lots which it covered, so as to leave the lien in question unimpaired, and the lot upon which it operated was sufficiently valuable to produce the money now in hand, so that the complainant's demand with their costs, must be satisfied out of it.

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BAILEY

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LE ROY.

BAILEY v. LE ROY, *et al.*

When a bill sets forth a contract in writing, alleging it to be signed by the defendant or his authorized agent, a plea, averring there was no writing subscribed by him or his authorized agent, is inadmissible—such a defence is the province of an answer.

Land was struck off to E. (who, in truth was one of the sellers), he let B. take his place, the latter agreeing to give his note for an advance or premium, paying deposit to the auctioneer and receiving the auctioneer's receipt as the buyer. On a bill for specific performance, a plea of the statute of frauds was interposed, but overruled, with liberty, however, to E. to set it up in an answer—it being a case of some nicety.

January 19,  
1836.

*Pleading.*  
*Plea.*  
*Statute of*  
*frauds.*

Bill for specific contract of a sale of lands; and plea of the statute of frauds interposed. No answer accompanied the plea.

The bill showed a sale of certain lots in the city of New-York: and among them, some struck off to the defendant Daniel Le Roy, who, with his associates, had directed the same to be sold. The latter, with other persons associated with him, contracted to sell and did sell the complainant the benefit of the contract, by substituting him as the bidder and purchaser, upon his agreeing to give them his note for twenty-six hundred and sixty dollars as a premium or advance; and he paid the auctioneers ten per cent., pursuant to the terms of sale, and took the usual certificate from the latter, as follows: "No. 180. Receipt for deposit for \$2272. New-York, Dec. 15, 1834. Received from Mr. John S. Bailey twenty-two hundred and seventy-two dollars, being ten per cent. deposit, according to the conditions of sale, upon his purchase of sundry lots of ground on 18th and 19th streets, Nos. 11, 12, 25, 26, 95, 96. 56, 59, 16, 17, 18, 85, 86, 62, 63, 66 & 67, per map sold him at auction for \$22,720, for which a good and sufficient title is to be given by Daniel Le Roy Jr. or others. This deposit will, under no circumstances, be paid over to either buyer or seller

without their mutual consent and the production of this receipt. *Jas. Bleecker and Sons, Auctioneers.*"

It appeared, also, by the bill that at the time Daniel Le Roy and his associates sold the property at auction they had not received a conveyance. Points upon the title were also raised by the complainant and other buyers and this caused a delay in Le Roy's perfecting his own title and in giving deeds to the purchasers. Afterwards, Le Roy obtained his conveyance; and insisted upon giving the complainant a deed without covenants of title. The complainant stated his willingness to give his promissory note by way of premium or advance.

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Mr. J. Duer, for the defendants and in support of the plea.

Mr. D. Lord, for the complainant.

THE VICE-CHANCELLOR:—It is very properly conceded by the defendant's counsel that if the auctioneer's receipt for the ten per cent. deposit contains the whole of the contract which it is sought to have specifically performed, that then it is not a case within the statute of frauds and a plea of the statute cannot be supported. May 31.

When a bill sets forth a contract in writing, alleged to be signed by the defendant or his authorized agent, a plea of the statute, averring that there is no writing subscribed by the party or his authorized agent is inadmissible, because it is merely denying what is alleged in the bill and brings forward no new fact in opposition—which is the proper office of a plea. If a denial merely be intended, it must be by way of answer.

I am inclined to say that, for all the purposes of the statute, the auctioneers' receipt, under present circumstances, may be deemed the whole contract. According to the bill, the sum of two thousand six hundred and sixty dollars was agreed to be paid for the privilege of becoming the purchaser, as a premium on being let in to take the place of the person to whom the property had been struck off at auction and to have the benefit of the contract of sale thus

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made. This contract was transferred to the complainant ; and he insists upon its being enforced. The two thousand six hundred and sixty dollars was the price or consideration for the transfer and substitution and, consequently, a new and distinct agreement and did not enter into the contract of sale itself—as is evidenced by the auctioneer's receipt. It is true, the complainant must pay the two thousand six hundred and sixty dollars before he can have the full benefit of the purchase. Still, this may be considered no part of the price of the land as fixed and agreed upon, but an addition and in some measure distinct from it.

If this be a correct view of the case, and it appears to me to be one which can be sustained, the plea should be overruled. Yet, in making the order for this purpose—it being a point of some nicety—I deem it proper to allow the defendants to set up and insist upon the statute in an answer.

Let there be an order accordingly : overruling the plea, with costs.

The People, *ex rel.* WYCKOFF *et al.* v. BOYD.

The stating a fact affirmatively in a deposition is not to be put down by a negative deposition. Thus, where a party swears to the service of a paper, it is not enough to deny service.

Although a solicitor appears for different defendants at different times, yet the solicitor for the complainant should, in every case, serve a copy of the bill whenever he serves notice of an order to answer ; and should not go upon the idea of the opposite solicitor's requiring only one copy.

A right which a solicitor has, for his client, under any rule or practice, can be waived by parol. A solicitor, therefore, who waived his right to a copy of an answer by parol, is bound thereby and cannot afterwards raise the objection of a want of service of a copy.


Feb. 29.

1836.

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**Practice.**  
**Deposition.**  
**Copy of bill.**  
**Parol waiver.**

The bill was filed against John Boyd and John Sniffen. Mr. Mulock appeared for the defendant John Sniffen alone ; and a copy of the bill was served upon him requiring the defendant Sniffen to answer. Soon after, Mr. Mulock appeared for the defendant John Boyd. The solicitor

for the complainants then sent a notice to Mr. Mulock—and which was sworn to have been served upon a clerk of Mr. Mulock's—notifying him that an order had been entered, requiring the defendant, John Boyd, to answer the bill in forty days after service of a copy of the said bill and notice of the said order or that an attachment issue; and the notice had the following added to it: "Having served you with a copy of the bill heretofore, when you appeared for the defendant, Sniffen, I suppose another copy is not now necessary—if required, please send me written notice. July 2nd 1835. Yours, &c. S. F. Clarkson. Solr. for Compls. To Wm. Mulock, Esq. Solr. for Deft. Boyd (& Sniffen.)"

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In August last, attachments were issued against both the defendants for not answering and the writ against the defendant Boyd, for not answering, was sent to the sheriff of Queens County; but this attachment was lost or had miscarried. About the fourth day of December, one thousand eight hundred and thirty-five, Mr. Mulock assured the solicitor for the complainant that he would put in a copy of Boyd's answer in ten days thereafter; and the following written stipulation was signed: "We consent the answers of the defendants herein be put in in ten days and that the proceedings on attachment be discontinued on payment of disbursements. Dated 4th Decr. 1835. Wm. Mulock, Sol. for Defts. S. F. Clarkson, Solr. for Compls."

It also appeared that Mr. Mulock told Mr. Clarkson he did not wish for another copy of the bill to be served upon him in behalf of the said Boyd, for that the copy he had received on behalf of the defendant, Sniffen, was sufficient.

No answer being ultimately put in for the defendant, John Boyd, an attachment was issued; the defendant was taken and brought into court; interrogatories were filed; and, in answering, the interrogatories the defendant Boyd denied knowledge of a notice to answer, and believed that no such notice had been ever served. He also, in the same answering, showed that his answer was drawn out and sworn to and in his solicitor's hands as far back as the eighth day of October, one thousand eight hundred and thirty-five: but that the making out of such answer was gratuitous and done without relation

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to any notice requiring it. In order to confirm the denial of a notice to answer being served, the clerk in the office of the solicitor for the defendant, Boyd, swore that he had received, at different times, papers and notices from the clerk of Mr. Clarkson; that all papers he received, he was fully confident he handed over to Mr. Mulock the solicitor; that he was the sole clerk in the said office, and had been such clerk since the fourth day of June then last. And Mr. Mulock also deposed that no such notice, as was pretended to be served by the clerk of Mr. Clarkson, had been received by the deponent from his clerk; nor had the deponent the least recollection of such notice being received in his office; that no entry of such was in the deponent's register; that it was the constant practice in his office, when papers were received in his office, to have them entered in the register, and on deponent's return they were handed to him personally by his clerk. Nor had the deponent any recollection, since his said clerk had been with him, of any manner of mistake in the receiving and communicating papers; that the deponent signed an agreement to answer under the full belief that no order to answer had been entered or noticed; and that he had carefully searched in the office of the deponent for the notice of order to answer herein and could find no such notice in his office.

*Mr. Clarkson*, for the complainant.

*Mr. Mulock*, for the defendant.

THE VICE CHANCELLOR :—The first question is, whether the notice for the defendant Boyd to answer was ever served. The complainant's solicitor not only produces the deposition of his clerk to show that service was effected, but he gives a copy of the very notice which was served; while the defendant as far as he can, denies such service; and the affidavit of his solicitor and that of his clerk would go to confirm the denial. But it is to be observed here that, the stating a matter affirmatively is not to be put down by a negative deposition in this way: although it may very well be that there is no intention of false swearing.

Then, as to serving the notice without a copy of the bill.

I have no hesitation in saying that, where a solicitor appears at different periods for different defendants, a copy of the bill should, in each case, be served. This practice ought to be adopted, for the defendants may have different defences to make, and they may live far apart and their solicitor may wish to furnish each with a copy at the same time, in order to receive their respective instructions for drawing the answers. In this case, it ought to have been done—it would have confirmed the service which is now in dispute. The complainants solicitor should not have enquired whether the defendant's solicitor required another copy of the bill: for the latter could have notified the former if he did not want it.

Still, I hold that a solicitor may waive a right in a matter of practice by parol. It is so in the Supreme Court, and I consider it as waived in the present case. On the fourth of December last, the solicitor for the defendant (and after an attachment had been issued for not answering) signed a stipulation that the answer should be put in within ten days. Under the circumstances, it appears to me he has waived all objection to the regularity of the proceedings to compel an answer. It is very remarkable, that these delays should have taken place, when the answer was ready and sworn to and in the hands of this defendant's solicitor to be filed as far back as the eighth day of October last.

The only question is as to costs. All this proceeding might have been avoided by a filing of the answer. The defendant, John Boyd, must pay the costs.

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1836.

PARTRIDGE  
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## PARTRIDGE v. JACKSON.

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All bills must have the signature of counsel; and the defect cannot be remedied after the pleading has once got on the files, unless under an order of the court. A bill signed by counsel while it was on the files, ordered to be stricken off.

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June 6,  
1836.

Practice.  
Bill.  
Signature of  
counsel.

Application to strike the bill off the files of the court. It had been filed without signature of counsel. The solicitor of the defendant had gone to the clerk's office, for the purpose of perusing it, and found it to be thus without the signature of counsel. He gave notice of appearance, and demanded a copy of the bill under the statute. In the meantime the solicitor for the complainant had found out what the bill required and got counsel to sign it in the clerk's office.

Mr. D. Graham, Jr., for the motion.

Mr. A. Wright, contra.

THE VICE-CHANCELLOR :—Two objections are raised upon this motion: 1st, that the bill was not signed by counsel when filed; and, 2nd, that the after signature was irregular.

I consider it indispensably necessary that a bill should have the signature of counsel before it is put upon the records of the court. This is laid down in books of practice and is borne out by cases. Mr. Hoffman states it distinctly in his book of Practice, vol. 1, p. 97, and refers to the case of *French v. Dear*, 5 Ves. 547, where the bill was ordered to be taken from the files, even though the cause had reached a hearing and also to the case of *Kirkley v. Burton*, 5 Mad. 378, where a demurrer was sustained in consequence of the bill not having been signed by counsel. And the English

books of practice carry the same regulation on their face, having gathered it from Lord Bacon's rules.

The regulation is a right one, for there ought to be some one responsible in case there should be any thing scandalous or impertinent in the bill. Chancellor Walworth said, in *Doe v. Green*, 1 Paige's C. R. 349, that the counsel whose name is put to a pleading, containing scandalous or impertinent matter, is personally liable to the adverse party for the costs of the proceedings to expunge the scandal or impertinence; and his Honor, in *Powell v. Kane*, 5 Paige's C. R. 267, observes: "It is the settled law of the court, that the solicitor who draws a scandalous or impertinent pleading or proceeding and the counsel who sanctions it with his name are both personally liable to the adverse party, for the costs of expunging the scandalous or impertinent matter. And, as a general rule also, such costs should be charged upon them instead of their client, in the first instance; although the client is also liable therefor." And this is right: for the records of the court should be kept pure. The statute also recognizes it, in allowing a fee, although a small one, to counsel for perusing and signing a pleading of this kind.

Although this is a mere judgment-creditor's bill, yet still it must have the signature of counsel. There can be no distinction in this respect. It is true, the solicitor who filed the bill was also of the standing of counsel; and if he had signed in both capacities, it would have been sufficient—but he has not done so.

If this defect be sufficient to overturn the bill by a demurrer, it is enough to uphold and authorize the granting of a motion to have it taken off the files.

Then, as to the after-signature. An affidavit, which has been read on the motion, shows how it has been done. It appears that the solicitor for the complainant, after the bill was on file, casually met a counsel in the clerk's office, and there got him to sign it—this counsel not knowing, when he did it, that the bill had been already on the files of the court. If a counsel chooses to risk his signature to a bill, he can do it, and I see no reason why the defendant should be allowed to object. But the present bill belonged to the files

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of the court; and it appears by affidavit, that the complainant intended to avail himself of the objection. I consider it was not regular to add the signature of counsel after the pleading had been filed.

The court might have granted an *ex parte* order, perhaps, allowing it to have been done, if an application had been made—subject, however, to the just rights of the opposite party.

I do not see but what the order must be to strike the bill from the files of the court, although it may operate, in some degree, as a hardship. It appears to have been an inadvertence on the part of the complainant's solicitor; and the object of the present motion appears to be to get rid of the costs of the suit. The defendant admits he is abundantly able to pay the judgment and has made a tender of the amount. His conduct does not stand in a very justifiable light: for it further appears that the debt arose for money lent in friendship.

I must grant the motion, but without costs.

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J. P., by will, devised the residue of rents and profits of real and personal estate to his children C. B., J. I. P., D. D., W. P. and P. R. P. to be equally divided between them and their legal heirs; and in case any of his said children died without issue, his or her share should revert to the remaining children; but in case of one dying and leaving issue, then the part which such child would have been entitled to should make a share for his or her child. There was a power to his executors to sell all the real estate, add all the personalty to it and divide the same into five parts, and dispose of one fifth to the said C. B. or her legal heirs, one fifth to the said J. I. P. or his legal heirs, one fifth to the said P. R. P. or his legal heirs, one fifth part at interest, such interest to be paid to the said D. D. and in the event of her death before her husband, to appropriate the interest to the benefit of her children as they came of age; and if she survived him, then she was to be put into the full possession of the one fifth. And the remaining one fifth was to be placed at interest for W. P. (another child); and in case of his death leaving no issue, then this fifth was to be divided between the testator's surviving children and his legal heirs, but should he reform in his habits, then he was to have the entire possession of this fifth part. The will directed the executors to sell a house in Broad Street and out of the proceeds to pay a legacy; and the residue of the purchase money was to be divided into six equal parts, one was to be given to his wife and the remaining five sixths were to be distributed among his children and their legal heirs in the same manner as had been before directed with regard to the real and personal estate after the death of his wife. The widow survived all the children, except W. P., and then died. W. P. was living, but had never any children. C. B., D. D., J. I. P. and P. R. P. were all dead leaving children. Prior to the deaths of P. R. P. and J. I. P., they had respectively assigned their rights in the testator's estate by way of mortgage, without their widows having joined: *Held*, that the children took an estate for life in the property, and that the remainder in fee went to the children of the devisees, i. e. all the children of the devisees, and not merely those born at the time of making the will or at the death of the testator. That the lands passed by a devise of the rents and profits; and were vested in the devisees, subject to the power of sale in the trustees; and when this was executed, the proceeds belonged to the devisees for life in remainder in like manner as the land. That the proceeds of the Broadway House, after setting apart a sixth for the widow, stood upon the same footing. That as J. I. P. and P. R. P. had only a life estate, their widows had no dower; and the mortgages only operated upon their shares of the rents and profits. That W. P.'s share was to be put out during his life and afterwards divided among his brothers and sisters children *per stirpes*. Shares of infants to be paid to general guardians, and where there were no general guardians, to be paid into court. The shares of femes covert (if of age) to be paid over on joint receipts of themselves and husbands.

Bill for directions in relation to the distribution of the estate of John Post, deceased.

The testator, by his will, dated the fourth day of July one thousand eight hundred and seventeen, among other provisions for his wife in lieu of dower, bequeathed to her one

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thousand dollars to be paid annually out of the rents, issues and profits of his real estate and also one half of the ready money in his house at the time of his death. He gave the residue of the rents, issues and profits of his real and personal estate to his five children, namely, Catharine Butler, John I. Post, Deborah Douglass, William Post and Peter R. Post, to be equally divided between them or their legal heirs according to the terms thereafter named. And in case any one of his children should die without lawful issue, then his or her part or share should revert to and be equally divided amongst his remaining children; but in case any or either of them should die leaving lawful issue, then the part or parts which such of his said child or children would have been entitled to should make a share or shares, part or parts for his, her or their children. Then followed a power to his executors, after the decease of his wife Deborah, to sell all his real estate and to add all his personalty to it and to divide the same into five equal parts: and to dispose of them in the following manner, to wit, one fifth part they should give to Catharine Butler or her legal heirs, one fifth part to John I. Post or his legal heirs, one fifth part to Peter R. Post or his legal heirs, one fifth part at interest, on good and sufficient security, the interest of which they should pay annually to Deborah Douglass; and in the event of her death before her husband, to appropriate the interest to the benefit of her children, giving to each, as they came of age, the principal of their own equal part or portion. But should she survive her husband, then the whole of her one fifth, put out, should immediately or as soon as convenient be put into her full and entire possession. The remaining one fifth part to be put at interest for the benefit of William Post, the interest to be paid to him annually; and in case of his death without lawful issue, then this one fifth should be equally divided between the testator's surviving children or their legal heirs—but should he reform in his habits so as to be deemed fit to be entrusted with its management, the executors were then to give him full and entire possession of his said one fifth part. The will then directed the executors to sell a house and lot in Broad Street and out of the proceeds to pay a legacy of two hundred and fifty dol-

lars ; and the residue was to be divided into six equal parts, one of which his executors were to give to his wife and the remaining five sixth parts they were to distribute and dispose of among his children or their legal heirs precisely in the same mode and manner as he had above directed them to dispose of the five equal parts of his estate both real and personal after the decease of his wife. The testator appointed four of his children, namely, Mrs. Butler, Mrs. Douglass, John I. Post and Peter R. Post executors of his will.

The widow survived all the children, except William Post, and died on the sixteenth day of July one thousand eight hundred and thirty-four. William was still living, but had no children—nor had he any at the time of the testator's death. Catharine Ritter then had five children, who were all alive ; but she died in the year one thousand eight hundred and twenty-eight. Deborah Douglass, at that time, had six children and died in the same year with Mrs. Ritter. Her six children were still living. At the time of the testator's death, John I. Post had eleven children ; he died in the year one thousand eight hundred and twenty, leaving a widow and twelve children ; three of whom had died intestate and without issue, another of them, a daughter, died leaving a husband and three infant children who were alive. These four deceased children of John I. Post had died previous to the death of the testator's widow. Peter R. Post, at the time the testator died, had one child, who departed this life in the year one thousand eight hundred and twenty-three, leaving a widow and three children ; and all of whom are living.

The present trustees had sold real estate since the death of the widow to the amount of fifty-two thousand six hundred and seventy-five dollars.

On the first day of May, one thousand eight hundred and twenty-nine, Peter R. Post was indebted to Catharine Ritter in the sum of two thousand three hundred dollars ; and, on that day, executed to her a bond and assignment by way of mortgage of all his right, title and interest in the estate coming under his father's will, for securing the repayment of the debt, with interest.

John I. Post, being indebted to his father on several bonds

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and with a view of securing his estate from any loss on account thereof, did, on the twenty-fourth day of December one thousand eight hundred and twenty-nine, execute, to his co-executor, an assignment of all his interest in the estate under the will, so far as might be necessary to secure the indebtedness.

The assignments thus made respectively by Peter R. Post and John I. Post remained in force and the debts were unpaid at the time of their deaths.

It was necessary to ascertain what rights and interests they took in the estate under the will, in order to determine how far these mortgages were now operative upon the shares which were devised to them? and another question was, whether the widows of John I. Post and Peter R. Post, were entitled to dower, either legally or equitably, in such shares?—they not having united with their husbands in the assignments.

The trustees prayed for advice and direction: 1. as to whether the assignees or mortgagees of John I. Post and Peter R. Post were entitled, out of the estate under the assignments, to any thing more than to their respective shares of the rents and profits of the estate during the respective lives of the assignees? 2. Whether their widows were entitled to dower as claimed by them? 3. What disposition should be made of the share which was given and devised for the benefit of the testator's son, William Post? 4. What disposition should be made of the shares, upon the distribution, which belonged to infants? and, 5. Whether the petitioners should report their proceedings to this court in relation to the sales of the real estate or of what they might hereafter do under and by virtue of their appointment as trustees?

*Mr. J. P. Hall*, for the trustees.

*Mr. J. Dikeman*, for defendants.

**THE VICE-CHANCELLOR:—**Under the devise of the residue of the rents and profits, after the one thousand dollars annually is taken out of the same for the widow of the testator,

I am of opinion that the children of the testator, namely, Mrs. Ritter, Mrs. Douglass, John I. Post, Peter R. Post and William Post, take life estates in the lands as tenants in common, with benefit of survivorship or cross-remainders for life, in the event of one or more of them dying without lawful issue. The words "or their legal heirs according to the terms hereinafter named," are, in this will, words of purchase and carry the remainder in fee to the children of the devisees above named: *Crawford v. Trotter*, 4 Mad. C. R. 361; *Jeffery v. Honeywood*, Ib. 398.

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This is manifest from the two next clauses of the will, in which the testator gives the share of any one dying without lawful issue to the survivors and then "in case any or either of them" (the five children) "shall die leaving lawful issue, the part or parts which such, &c. would have been entitled to, shall make a share or shares, part or parts for his, her or their children." Here the word "*children*" is used as being the legal heirs referred to in the devising clause; and they are to take substitutionally. The devise to them is of a distinct estate in their own right; hence, the first must be deemed a life estate in the testator's five children respectively; and the second, which is to their children, an estate in remainder upon the determination of the respective life estates in their parents. The persons entitled to this estate in remainder are all the children of the first takers respectively and not merely those who were born at the time of making the will or at the death of the testator: *Crone v. Odell*, 1 B. & B. 483; 3 Bro. C. C. 404, n. 2.

The title to the lands passed, in this case, by the devise of the rents and profits: see, *Paterson v. Ellis*, 11 Wend. 296, and cases there cited. It vested in the devisees and not in the executors.

The devisees, however, took the legal estate subject to the power of sale in the executors or trustees, which is a naked power in trust. When this power was executed, the proceeds belonged to the devisees for life in remainder, in like manner as the land; and the directions for distribution appear to conform thereto and to carry out the intention of the testator in that respect.

The proceeds of the Broad Street house and lot, after



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paying off the legacy of two hundred and fifty dollars and setting apart one sixth for the widow, stands upon the same footing as the proceeds of the other parts of the estate sold since the widow's death. The whole must be divided into five equal parts. One fifth part, with one fifth of the rents or interest and income since the death of Mrs. Ritter, now belongs to her children absolutely and is to be divided equally among them. One other fifth part, in like manner, belongs to and is to be divided between the five children of Mrs. Douglass. Another fifth part belongs, in like manner, to the children now living of John I. Post and to the children of the deceased daughter Sarah Vermule: these three children being entitled to their deceased mother's share subject to their father's right as tenant by the curtesy—for I consider that the proceeds of the real estate is still to be regarded as land in this distribution.

John I. Post had but a life estate under the will. His widow, Mrs. Agnes Post, has no right of dower in this share of the estate. Nor is the assignment made by way of mortgage of any effect beyond the rents, profits and income of the one third during the life of John I. Post. Another one fifth part belongs to the children of Peter R. Post deceased; and is to be divided between them. Their mother, Mrs. Ann Post, has no right of dower in it. And so with respect to the mortgage given by him to Mrs. Ritter, it only operated upon his share of the rents and income so long as he lived. The remaining one fifth, the trustees are to hold and invest for the benefit of William Post during his life. At his death without a child or children, it will belong to the children of his deceased brothers and sisters and must be divided among them in like manner as above, each set of children taking one fourth *per stirpes* or by representation.

With respect to the shares of those who are infants (in this general distribution or settlement) the trustees will be safe in paying the money to their general guardian; and if they have no guardians, their shares may be paid into court where it can be invested until they come of age.

The shares belonging to *femes covert* may be paid over upon the joint receipts of themselves and husbands, provided they are of age.

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Contracts for personal services are matters for courts of law ; and equity will not compel specific performance.


An actor agreed in writing with a manager not to perform at any other theatre for a term of years. He broke his engagement ; and a bill was filed to restrain him by injunction and to compel performance. *Held*, that it was a mere matter between employer and employed, and the remedy was at law. A preliminary injunction which had been granted was dissolved.

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The complainant, Thomas S. Hamblin, was the lessee and manager of the Bowery Theatre in the city of New York. He had entered into an agreement for the services of the defendant David S. Ingersoll as a comedian, which was reduced into writing and whereby the said Ingersoll engaged himself to the complainant for the term of three years ; and covenanted and agreed to perform and enact for three years all such parts of the drama which the complainant should require either in the city of New York or any other city in the United States or the Canadas ; and the said David S. Ingersoll was not, during the said term, to be at liberty to play at any theatre or for any person or persons benefit without the consent of the complainant his executors, administrators or representatives first had and obtained for such purpose in writing. In consideration of all this, the complainant bound himself to pay the said Ingersoll for the first year fifteen dollars per week, for the second year twenty dollars a week, and for the third year twenty-five dollars per week, together with a clear third of two benefits in each year.

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 actor.*

The bill set forth this agreement ; and alleged that the defendant Ingersoll entered upon and commenced his en-

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gement under it. It went on to show that the other defendant, William Dinneford, had opened a theatre called the Franklin Theatre, New York; and although he well knew and was notified of the said agreement which the said David S. Ingersoll had entered into with the said complainant, yet he, the said Dinneford, had agreed and the said Ingersoll had engaged for the performance of the said Ingersoll at the said Franklin Theatre without the consent of the complainant; and the said Ingersoll had left the theatre and employment of the complainant. Prayer: that the said William Dinneford and David S. Ingersoll might be restrained from playing or appearing or performing as an actor at the Franklin Theatre or at any other theatre during the period of his said engagement with the complainant, without his written consent; and that the said William Dinneford his agents and servants might be restrained from permitting or suffering the said David S. Ingersoll to perform at the said Franklin Theatre until the further order of the court. And for further relief.

The defendant, Ingersoll, in his answer, admitted the making the agreement, but alleged his being a minor at the time he signed it; and he considered himself at liberty to make an engagement with the defendant, Dinneford, on the ground of the complainant, having withheld a part of his salary. While Dinneford, in his answer, denied knowledge of Ingersoll's agreement with the complainant.

A preliminary injunction had been granted; and a motion was now made to dissolve it.

Mr. *T. S. Brady*, for the defendant Ingersoll; and Mr. *T. J. Smith*, for the defendant Dinneford.

Mr. *C. W. Sanford*, for the complainant.

**Novemb. 10.** THE VICE-CHANCELLOR:—The most important question for the court is, as to its jurisdiction in this case.

The bill is in the nature of one for a specific performance. It seeks, by its prayer, to compel performance at the theatre embraced by the agreement.

When the injunction was applied for, I had some hesita-

tion whether the court should not leave the parties to law: for, in general, matters of personal services are matters for law. There may be some special exception; and there are cases where a party is restrained in breaches of covenant: but then they are such as relate to property of some kind; and not where personal services are sought to be compelled. Thus, in *Barfield v. Nicholson*, 2 S. & S. 1, a work entitled "The Architectural Dictionary" had been pirated by the defendants in a book called "The Practical Builder." An injunction had been granted by the Vice-Chancellor to restrain the publication, contrary to a covenant; and it was sustained upon an appeal to the Lord Chancellor.

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The case of *Barret v. Blagrove*, 5 Ves. 555, has been cited. There, the house of the defendants adjoined Vauxhall gardens. It had been originally let by Tyers and Barret, the proprietors of the garden, under an express covenant from the lessee not to carry on the trade of a victualler, retailer of wine or any employment which would be to the damage of the proprietors of Vauxhall gardens, upon the penalty of forfeiting the lease and fifty pounds a month. The lessees underlet to the defendant, who had become insane; but his wife kept the house open during the season for the gardens as a house of public entertainment, where liquors and refreshments were supplied. The court granted an injunction. In that case, it will be observed, the covenant related to the gardens, and to the use to be made of the demised premises—and was not a matter involving the consideration made of personal services to be performed. *Adderly v. Dixon*, 1 Sim. & Stu. 608, contains the principle upon which this court decrees specific performance of contracts for land and sometimes in relation to matters of a personal nature; but it has no particular application to this case.

There is, however, a case, and upon the strength of which I was induced to grant the injunction in the first instance, which would seem to be in point: *Morris v. Colman*, 18 Ves. 437—more fully adverted to by Lord Eldon, in *Clarke v. Price*, 2 Wilson, 157. As reported in Vesey, the court seems to have interfered on the ground of partnership. Mr.

1835. Colman was the acting manager of the Haymarket Theatre. An injunction had been granted restraining him from acting as manager; and a reference was directed to ascertain whether he had performed the duties of manager. Upon a motion to dissolve the injunction, a question arose upon the validity of a clause in the articles restraining him from writing dramatic pieces for any other theatre. And the court deemed the agreement in that particular legal. But we have a somewhat different version of the case in *Clarke v. Price*. And here it may be as well to revert to this case of *Clarke v. Price*. The defendant, Mr. Price, had agreed to furnish the complainants, who were publishers, with reports of cases argued and determined in the court of exchequer. When about four volumes were out, Mr. Price made some contract with the other defendants, Brooke and Sweet, by which he had bound himself to write and compose new volumes of reports of cases in the court of Exchequer and in the exchequer chamber; and the complainants insisted that they were entitled to have an assignment duly made to them of all the copyright. Bill for specific performance; and, an injunction. The case of *Morris v. Colman*, had been referred to; and the Lord Chancellor thus spoke of it: "The case of *Morris v. Colman* is essentially different from the present. In that case, Morris, Colman, and other persons, were engaged in a partnership in the Haymarket Theatre, which was to have continuance for a very long period, as long indeed as the theatre should exist. Colman had entered into an agreement which I was very unwilling to enforce; not that he would write for the Haymarket Theatre, but that he would not write for any other theatre. It appeared to me, that the court could enforce that agreement by restraining him from writing for any other theatre. The court could not compel him to write for the Haymarket Theatre; but it did the only thing in its power; it induced him indirectly to do one thing, by prohibiting him from doing another. There was an express covenant on his part contained in the articles of partnership and there was a decree directing the partnership to be carried on; it could not be put an end to, and it was the duty of the parties to interfere." But with respect to the principal case of *Clarke v. Price*, he ob-

serves, that if the contract is one which the court will not carry into execution, the court cannot indirectly enforce it by restraining Mr. Price from doing some other act. This is an agreement which expressly provides that Mr. Price shall write and compose reports of cases to be published by the plaintiffs. But I have no jurisdiction to compel Mr. Price to write reports for the plaintiffs. I cannot, as in the other case, say, that I will induce him to write for the plaintiffs, by preventing him from writing for any other person, for that is not the nature of the agreement. The only means of enforcing the execution of this agreement would be to make an order compelling Mr. Price to write reports for the plaintiffs; which I have not the means of doing. If there be any remedy in this case, it is at law. If I cannot compel Mr. Price to remain in the Court of Exchequer for the purpose of taking notes, I can do nothing. I cannot, indirectly, and for the purpose of compelling him to perform the agreement, compel him to do something which is merely incidental to the agreement. It is also quite clear, that there is no mutuality in this agreement." He was, therefore, of opinion the court had no jurisdiction in the case. The difference in the two cases is here seen. In the one, Colman agreed not to write for any other theatre, not however that he would write for the Haymarket. While, in *Clarke v. Price*, the latter agreed to write reports for the complainants, but had not restrained himself by a covenant from writing for any one else. In the case now before the court, the covenant of Mr. Ingersoll is both ways, that he will perform at the complainant's theatre, and will not perform at any other; and so far, it might be thought to be within *Morris v. Colman*, to warrant the preliminary injunction. But the difficulty is, how to compel specific performance. The court cannot oblige Mr. Ingersoll to go to the Bowery Theatre and there perform particular characters. Imprisonment for a contempt would be the consequence of his refusal, and this would defeat the very performance sought to be enforced. Chancellor Walworth refers to this sort of thing in the case relative to the Italian opera (*De Rivafinoli v. Rossetti*, 4 Paige's C. R. 264;) and treats the subject as it deserves. The court can make no such

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order. The only relief it could give would be to restrain this actor from performing elsewhere than at the Bowery Theatre, but this would leave the positive part of the agreement untouched. As I have before observed, the case is, in truth, different from *Morris v. Colman*. There, was a co-partnership; and if that had not appeared, the court could not have entertained jurisdiction. Not so here. This is a mere matter between employer and employed. The parties must be left to law.

The injunction must be dissolved; and if this is to be the case as to Ingersoll, it must also be dissolved as to the defendant Dinneford. Let it be without prejudice to the rights of all parties at law. Costs may abide the event of the suit.

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*Note.* Since the foregoing opinion was delivered, the case of *Kemble v. Kean* has appeared in the Reports, (6 Simon 333.) There the defendant had agreed with the proprietors of Covent-Garden Theatre to act for, twenty-four nights during a certain period of time at their theatre at a salary of £50 for each night, and that he would not perform at any other theatre in London during the period of his engagement. Upon a bill filed for a specific performance, an injunction *ex parte* was granted, restraining the defendant from acting at Drury-lane or any other place in London. A motion was afterwards made to dissolve it, when, upon a review of the cases of *Morris v. Colman* and *Clarke v. Price*, it was held, that the court could not enforce the positive part of the contract, and therefore it would not restrain, by injunction, a breach of the negative part. In *Kimberly v. Jennings*, Ib. 340, the court proceeded on the same principle and allowed a demurrer to the bill.

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Although courts view with jealousy a mortgagee's acquiring an absolute ownership, yet there is no law against it where the transaction is fair. The law only prohibits a mortgagee from availing himself of a stipulation contained in the mortgage or in a separate instrument made at the time or of some covenant or agreement forming part of the original transaction, and by which he attempts, upon the happening of some event or condition, to render the estate irredeemable.

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The principal object of the bill in this cause was to reach *Novemb. 10,* a supposed interest of the defendants Charles Hay and *1835.* Elizabeth his wife in certain leasehold premises standing in *Mortgagor* the names of the defendant William Scott and one William *and mortgagee.* Legget (not a party); and to have it applied in payment *gee.* of a judgment which the complainants had recovered against the defendant, Charles Hay, for a debt or demand contracted with them by his wife.

The cause was heard upon the bill and an answer of the defendant William Scott—as to the defendants, Hay and wife, it had been taken as confessed.

The bill set forth that in the month of November in the year one thousand eight hundred and thirty and at various other times since, the complainants, being then co-partners in their law business, were employed as attorneys and counsellors at law, by and on behalf of Elizabeth Hay, in various suits and matters in different courts in this state, whereby the complainants became entitled to certain costs and fees to be paid by the said Elizabeth Hay; and for which costs and fees the complainants obtained a judgment as thereafter stated. That, by an affidavit made in the year eighteen hundred and thirty-one, the said Elizabeth Hay, in a suit pending in the New-York Common Pleas Court, in which she was plaintiff, it appeared, and from that information it was charged to be true, that the said Elizabeth Hay was married in the year eighteen hundred and one in Scotland,



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Great Britain, to one Charles Hay also a defendant, then private soldier in the British army; that Charles Hay became afterwards intemperate, and Elizabeth Hay came into the United States of America about the year eighteen hundred and twenty-two; and that, at the time of making that affidavit, she had not heard of or from the said Charles since she came into the said United States; and that she had always acted and done business here in her own individual name. That, while the said Elizabeth Hay was here without her husband and acting in her own name, she acquired very considerable property and effects in the course of her business and she also acquired certain leasehold premises in Laight Street in the city of New-York, on a lease from Trinity Church for a long term of unexpired years, subject to renewal; that the leasehold premises had been built upon and improved and let out and yielded a rent exceeding ground rent, taxes and other necessary expenses of two hundred and fifty dollars, which lease or assignment was to the said Elizabeth Hay in her individual name. That the said Elizabeth Hay, before her husband came to the United States of America, and as the complainants believed in the year eighteen hundred and thirty-one, transferred the said lease and all the premises therein described to William Scott and William Legget, co-partners doing business under the firm of Scott and Legget, in order, as pretended, to secure to them some debt, which assignment appeared to be an absolute and unconditional transfer. The bill charged that the assignment of the said lease, though absolute in its terms, was not intended to divest said Elizabeth Hay of all right legal and equitable, but, if any debt was due by her to the said Scott and Legget, it was secretly understood the assignment was of no other or greater effect than a mortgage to secure such debt—and charged the transfer was made absolute in its terms, with the understanding and intention to cover the property or some interest therein for the benefit of the said Elizabeth Hay and to hinder her creditors from reaching or affecting the same. That, notwithstanding the apparent sale and absolute assignment between the said Elizabeth Hay and Scott and Legget of the said lease, the said Elizabeth Hay had ever since remained in the

possession of the said premises and rented out from year to year such parts as she did not occupy ; and received the rents for her own use, not paying any rent herself, nor paying over the rent she received. That William Scott had transacted all or almost all the negotiations with the said Elizabeth Hay and was fully acquainted with all the particulars and William Legget had gone to Scotland and had not returned. That sometime in the year eighteen hundred and thirty two, Charles Hay arrived, for the first time, in the United States at the port of New-York, and, though during, the absence of her husband out of the United States she had a right to acquire property and transact business in her own name, yet, on his arrival, all his marital rights over her person and property, were in full force and legal operation ; and that, about the twenty-first day of April in the year eighteen hundred and thirty-four, the complainants prosecuted their suit in the court of Common Pleas of New-York against the said Charles Hay (the husband of the said Elizabeth Hay) for the costs and fees before mentioned due and payable to the complainants for their services rendered as attorneys and counsellors in divers suits and matters for the said Elizabeth Hay during the absence of her husband ; and afterwards, on the twenty-eighth day of May in the year eighteen hundred and thirty-four, recovered a judgment against the said Charles Hay for three hundred and fifty-six dollars and thirty-three cents, damages and costs, which was, on that day, duly docketed. That an execution was issued thereon, returnable the third Monday of June in the year eighteen hundred and thirty-four, upon which execution the sheriff returned that the said Charles Hay had no lands or tenements, goods or chattels ; so that the said judgment remained of record unpaid ; that by the aforesaid execution the complainants have exhausted their legal remedies ; and charged that the said Charles Hay had some equitable interest, things in action or other property of the value of one hundred dollars, &c.

The bill prayed for a receiver, with the usual powers ; and for an injunction ; and that Scott and Legget might set forth and establish their debt (if any) under the direction of the court ; and, if any debt or demand were established and

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allowed as prior to the complainant's judgment, that, after paying the same, the complainants said judgment might be paid, with interest, with their costs and charges, out of the surplus proceeds of sale of the said lease and premises ; and that Scott and Legget be charged with all rents they had received or permitted the said Elizabeth Hay to receive since the assignment—and for other and further relief.

The answer of the defendant, William Scott, (*inter alia*) admitted that the complainants were retained as attorneys and counsellors at law in a suit by and in behalf of Elizabeth Hay, but submitted, as a question of law, upon the circumstances of the case, whether they should be paid by the said Elizabeth Hay. The defendant believed and admitted the defendant, Elizabeth Hay, while here, without her husband and acting in her own individual name, acquired property and effects in the course of her business, and particularly some claims against one Thomas Roberts ; that Elizabeth Hay and Thomas Roberts referred all their claims to arbitrators (of whom the defendant was one) who, in September, in the year eighteen hundred and thirty, made an award in favor of the said Elizabeth Hay, for eight hundred and ten dollars ; that the bond and award were left with the complainants to collect the amount and they prosecuted a suit thereon in her name against the said Roberts and failed in the suit, and he believed nothing was collected. That sometime during or shortly before the month of March in the year eighteen hundred and thirty, the said Elizabeth represented to the defendant that she had an opportunity of purchasing a lease of a lot in Laight Street in which she then lived, and requested the defendant and his partner to advance her the sum of three hundred dollars—and, having entire confidence in the integrity of the said Elizabeth, this defendant and his partner Legget, as a firm, did advance to her the sum of three hundred dollars on the twenty-seventh day of March, eighteen hundred and thirty, where-with the said Elizabeth purchased the said lease and premises. That the annual ground rent of eighty dollars had been paid from time to time to the current year ; the rent ending November, eighteen hundred and thirty-four, and the previous half year, the defendant had paid. That the

said Elizabeth erected a building about nine feet wide and two stories high which cost between two hundred and three hundred dollars. That, since the premises were assigned to the defendant and his partner, they had let for two hundred and twenty-four dollars per annum, independent of a small space or room which the defendant allowed the said Elizabeth to occupy rent free, and which, if let out, would produce an additional sum of thirty dollars; and that the clear rent of the said premises, after paying ground rent, taxes and allowing for repairs and expenses, would not exceed one hundred and twenty-four dollars. The defendant believed that the description of the said building was not such as to enable the assignee of the lease to claim a renewal or payment for the building. That previous to the assignment to the defendant and his partner, Elizabeth Hay had become indebted to the defendant and his partner, in addition to the three hundred dollars advanced to purchase said lease, for other advances in cash to the amount of one hundred dollars. That, either shortly before or early in April, eighteen hundred and thirty-four, she called at the store of the defendant and stated she had lost her claim against Roberts or could not collect it and she had no other means of paying their dues, except by the leasehold premises; that, as she purchased the premises with their money, she considered it her duty to assign the lease to them; that this defendant consulted with his partner as to the value of the premises, and they finally agreed to take the same in satisfaction of the debt, and directed an attorney to prepare an assignment and, not knowing the exact amount of debt, directed the sum of five hundred dollars to be put in as the consideration, supposing the amount was of no importance and that sum not far from the balance due. That previous to this negotiation, Charles Hay, the husband of the said Elizabeth, arrived in the United States; and the said Charles Hay and Elizabeth Hay sold the said lease and premises to the defendant and his partner for the amount of their debt. That the defendant, on behalf of himself and partner, assumed control and ownership over the said lease and premises; and had collected and received the rents from the under tenants and paid ground-rents and other expenses thereon.

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That the said Elizabeth Hay left the said lease, with the assignment to her, in the possession of this defendant, shortly after the said assignment to her was executed; and this defendant considered it was intended by her as an equitable security for the three hundred dollars advanced by him and his partner to purchase the said lease.

He denied the said assignment was intended as a security for a debt, but a transfer in satisfaction of the amount due to Scott and Legget, although the defendant admitted he always had it in view to retransfer the said lease to the said Elizabeth, in case she was able to repay the amount of the said advances. That the assignment, which was absolute, was intended by the said Elizabeth Hay and her husband, and by this defendant and his partner, as a sale of all right and interest, legal and equitable, in the said lease and premises, the said Elizabeth stating, at the time of the arrangement, that she found herself involved in difficulty and unable to pay the debt due to the defendant and his partner, and an absolute assignment was made, which was received as a discharge of all indebtedness from the said Elizabeth Hay to Scott and Legget; and denied the assignment was given or received or intended to be given or received as a mortgage to secure any debt whatever or to cover the property or any interest therein for the said Elizabeth Hay or to hinder or delay the creditors of the said Elizabeth from knowing or reaching her interest therein. The defendant believed and admitted it was the intention and object of Elizabeth Hay to pay the defendant and his partner by a transfer of said lease; and, as a consequence, her other creditors would be prevented from reaching or affecting said premises. The defendant insisted the said Elizabeth and her husband had the legal and equitable right thus to pay Scott and Legget. That since the execution of the said assignment to Scott and Legget, he and his partner had rented out and received the rents and profits of the premises (except a small room which they allowed the said Elizabeth to occupy without rent as before stated and except further that the said defendant ratified the agreement made by Elizabeth Hay with the tenants before making the said assignment.) That defendant and his partner had received, through Elizabeth

Hay, some small part of the rents, which was paid through her by the occupants—but the defendant had generally collected them himself. That ever since the execution of the said assignment, Scott and Legget had continued to hold and did still hold the legal title under the said lease. The defendant submitted, as a question of law as to what would be the effect of the said Elizabeth's residence in the United States, and doing business as a feme sole from eighteen hundred and twenty-two to eighteen hundred and thirty-two, while the said Charles Hay was all that time without the jurisdiction, as to her having a right to acquire property and contract debts as a *feme sole*; also, whether on the arrival of the said Charles Hay within the state of New York, the marital rights of the said Charles over the property in possession or held by his said wife were in full operation? That the value of the premises at the time of the assignment would be variously estimated, by different persons, from six hundred dollars to eight hundred dollars; and he would be willing to sell for seven hundred dollars; that no renewal had been given or promised. That the said Elizabeth had not, since the said assignment, paid Scott and Legget any thing, except the rents as before stated.

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Messrs. *Remsen* and *Clarkson*, in pro. per.

Mr. *D. Selden*, for the defendant *William Scott*.

THE VICE-CHANCELLOR:—The bill proceeds mainly upon the ground of Scott and Legget's holding a lease, by way of mortgage or security, for a debt due to them; and that there is an equity of redemption or some interest remaining in Hay and wife or in one of them, which renders the property liable to be sold and the proceeds, after satisfying Scott and Legget's debt, subject, in equity, to the complainants judgment.

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The question then is: whether Scott and Legget stand as mortgagees or as the absolute and *bona fide* owners of the leasehold premises.

The answer is positive in denying that the relation of mortgagor and mortgagee existed after the assignment or

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that the defendants, Hay and wife, continued to have any legal or equitable right or interest in the property. It is, nevertheless, contended that the parties could not, by such a purchase, extinguish the redeemable quality of the estate which was before in Hay and wife—that, “once a mortgage, always a mortgage,” is an axiom applying to the present case. I think, however, it does not hold good here. Even regarding Scott and Legget as mortgagees, by the mere deposit of the lease, it was certainly competent for them to become the purchasers of the equity of redemption. There is nothing in the policy of the law to prevent a mortgagee from acquiring an absolute ownership, by purchase, from a mortgagor, at any time subsequent to the taking of the mortgage and by a fresh contract to be made between them. Courts view with jealousy and suspicion any dealing between mortgagor and mortgagee to extinguish the equity of redemption; but if it be fair and honest, on the part of the mortgagee, the purchase will not be disturbed. The law only prohibits a mortgagee from availing himself of a stipulation contained in the mortgage deed or in a separate instrument made at the same time, or of some covenant or agreement, forming a part of the same transaction with the loan and the taking of the security, by which he shall attempt, upon the happening of some event or contingency, to render the estate irredeemable and obtain an absolute ownership. In such cases, the maxim applies of “once a mortgage always a mortgage:” *Henry v. Davis*, 7 J. C. R. 40; *Clark v. Henry*, 2 Cowen’s R. 332. But it cannot interfere with the right to foreclose, when the mortgage has become forfeited, nor with any fresh contract which the mortgagor may choose to make with his mortgagee for a sale or relinquishment of the equity of redemption and the vesting the latter with an irredeemable estate: 1 Powell on Mort. 117, 122, and notes. Such a contract will be as valid and binding as any other when it is fair in all its parts and free from fraud.

In the present case, as between the parties to the sale and assignment of the lease, there is no ground for imputing unfairness to Scott and Legget or for holding that any equity of redemption remains. The circumstance of their being

willing to re-convey to Mrs. Hay, provided their original amount were paid and she could hold the property securely for her separate use, must be deemed gratuitous and as conferring no legal or equitable right to demand it. Neither Hay nor his wife seek to get back the property; nor do they assert any right thereto upon any ground of fraud, inadequacy of consideration in the assignment or that it was intended as a security merely and not a payment and satisfaction of the debt.

If there be no right of redemption in Hay and his wife—and, according to the answer, there is none—then the complainants, as creditors, can have no such right.

Whether the assignment was fraudulent as to creditors, is another question.

The complainants have not attempted, by this bill, directly to impeach it for fraud. It is not expressly charged, nor does the pleading pray that the agreement should be set aside on account of fraud. The equity of the bill is made to rest more particularly on the ground which has been considered; and I feel great difficulty, from the state of the pleadings, in entering into the consideration of fraud with respect to third persons. There are circumstances disclosed by the answer which may serve as *indicia* of fraud: such as selling the property in payment of an antecedent debt of four hundred dollars and without any advance, while the premises were at the time worth seven hundred dollars—the purchasers knowing of embarrassment from other debts and particularly the complainant's demand, which was then progressing towards a judgment—also, leaving Mrs. Hay, after the sale, in the enjoyment of a part of the premises free from rent. If these circumstances were distinctly charged as evidences of fraud, perhaps they might be explained away; and in the absence of direct allegation, I am not warranted in assuming them to be conclusive *per se* of fraud: see, *Cunningham v. Freeborn*, 11 Wend. 240.

Besides, there is a further difficulty. William Legget, who is interested as one of the owners of the lease, has not been made a party. He was absent for a time; and is alleged to have been abroad when the bill was filed. Still,

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the answer of his partner shows his return to the city of New-York and his residence there ever since. He should, then, have been made a party: the bill, if it would upset their title, being defective without him. If it were, in other respects, sufficient to raise the question of fraud, this objection might still be obviated by the cause standing over for amendment; but, as it is, I consider, upon the whole case as now presented, the bill must be dismissed as to the defendant Scott, with costs: yet, without prejudice to a new bill to be filed for the purpose of setting aside the assignment of the lease to Scott and Legget for fraud, provided the complainants shall think proper to pursue it. With respect to the defendants, Hay and wife, as to whom this bill stands confessed, it may be retained for such a decree as the complainants can properly claim.

MERCHANTS FIRE INSURANCE COMPANY v. GRANT and others.

An infant's deed being voidable only and capable of confirmation, may become confirmed where such infant, after age, makes his will and directs all his just debts to be satisfied.

G., an infant, obtained money on mortgage of real estate. He died, having, when of age, made his will and therein directed "all his just debts and funeral expenses to be first paid and satisfied." He also devised the property (without referring to the mortgage) to his mother in fee. The mortgagees filed a bill of foreclosure; when the infancy was set up: but the court decreed in favor of the mortgage, with costs.

Novemb. 17, Bill of foreclosure, under the following circumstances:
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*Mortgage by*  
*infant.*  
*Will.* In the month of February, one thousand eight hundred and twenty, the complainants advanced to Ebenezer Turrel Grant three thousand two hundred dollars; and took from him a bond and mortgage of land in the city of New-York, alleged to belong to him in fee simple. The loan was negotiated through Messrs. Shotwell and Son, who, as the bill alleged, were the brokers of the borrower, whereas the de-

defendants insisted that they acted for the company. It ultimately turned out that the mortgagor, Edward Turrell Grant, was under age at the time he executed the bond and mortgage. While the securities were outstanding, he died; having first made his will, which commenced with a direction as to his debts, as follows: "Imprimis, I order and direct all my just debts and funeral expenses to be first paid and satisfied;" and the property which he had mortgaged was given to his mother, in the words following: "Also, I give and devise to the said Elizabeth Grant and to her heirs and assigns for ever my two houses and lots of land known by Nos. 205 and 207, in William Street in the city of New-York, with the appurtenances." He appointed the defendants Elizabeth Grant and Richard Grant his executrix and executor.

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The defendants, in their answer, set up the infancy of the mortgagor at the time of giving the bond and mortgage, and alleged usury in the granting of the loan.

*Mr. John L. Lawrence*, for the complainants.

*Mr. Jacob Radcliff*, for the defendants.

**THE VICE-CHANCELLOR:**—I consider it the settled law of this state that the deed of an infant is voidable only, at his election when he comes of age or at the election of his heir or representative, and not absolutely void. It is, therefore, capable of confirmation; and the mortgagor Edward Turrell Grant, having made a will after he attained the age of twenty-one years, in which he orders and directs all his just debts, as well as funeral expenses, to be first paid, is so far from evincing on his part a disposition to avoid the debt contracted with the complainants and secured by his bond and mortgage, that I think it may well be understood as confirmatory of it. The court may infer from the will that such was his intention and that his object was to leave the whole of his estate, real and personal, to his mother, subject to the payment of the mortgage debt. She could have no right, therefore, to object to the payment out of the proper-

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ty: for it is left to her after the debts are paid. The court is justified, by the facts in this case and the circumstances under which the loan was obtained from the complainants, in laying hold of any equitable construction which can possibly be given to the will and to hold it to be a confirmation, instead of an avoidance of the bond and mortgage. For this we have a precedent in *Hampson v. Sydenham*, Nelson's Ch. Rep. 55.

As to the defendant Richard Grant, the father of the mortgagor and who has now a life estate in the mortgaged premises as tenant by the curtesy: upon every principle of justice and equity, he ought not to be permitted to set up the objection of his son's non-age. The father was privy to the whole transaction; was instrumental in procuring the loan from the complainants; and was present when the money was advanced and the papers executed—and, according to the testimony, received a part of the amount. He knew the fact, if it be so, that his son was not then of age and it was his duty to have apprised the complainants that they were dealing with an infant or for ever after to have held his peace on the subject. To permit him now to set up the objection, is to sanction his perpetration of a fraud. With the oppressive nature of the exactions of the broker employed by the father and son, if there were any oppression in the matter, the complainants had no concern. The broker was not employed by them, nor was he their agent.

There must be a decree establishing the validity of the bond and mortgage; and referring it to a master to compute the amount. Upon the coming in and confirmation of the report, let the property be sold in the usual manner to satisfy the complainants their debt and costs.

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FARMERS  
FIRE INS. &  
LOAN CO.MERRITT and another v. THE FARMERS FIRE INSURANCE.  
and LOAN COMPANY and others.

Where a person holds land in his own name, but is only a trustee, and dies, leaving a will, the rule is that the legal estate in such lands will pass by such general words as are sufficient to comprehend it in legal construction, unless, from circumstances appearing on the face of the will, it can be collected that the testator meant to devise his own property only and not property which he held as a trustee. If this should be apparent from the will, the legal title of trust property will not pass by the will, although general words are used sufficiently comprehensive to embrace the lands. The circumstances which weigh against the presumption are a charge of debts, limitations in strict settlement or any other disposition inconsistent with the idea of its being trust property and which leads to the inference that the testator could not have intended to give the legal estate of such property. The Farmers F. I. and Loan Company foreclosed a mortgage upon lands, and E. T., their president, bought the same in his own name and had it so conveyed; but, in truth, for the company. E. T. died before it could be made over to the company; and he left a will wherein he bequeathed and devised his personal property and real estate, by the description of "all my real estate," to executors upon trust for his children (some of whom were infants.) Upon a sale of the said lands, it was held that the title and conveyance must come from the children of E. T. and did not pass to the executors under his will. The company were directed to join in a release, with warranty and the guardian *ad litem* for such of the children as were infants was required to join in and execute a conveyance on their part.

## Bill for a specific performance.

O. E. mortgaged property at Buffalo to the Farmers Fire Insurance and Loan Company. They had to foreclose; and on the twenty-seventh day of August, one thousand eight hundred and thirty-four, the land described in the bill (forming part of the property mortgaged and foreclosed) was sold under a decree by Master Ford—and Elisha Tibbits, then the president of the Farmers Fire Insurance and Loan Company, and acting for them and not on his own behalf, purchased it. The property was conveyed by the master to Elisha Tibbits, in his individual capacity and without describing him as the president of the Farmers Fire Insurance and Loan Company.

In the month of February, one thousand eight hundred and thirty-five, and while the lands were still in his name,

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Elisha Tibbits died. He left a widow and five children—some of them being under age. He had made his will so as to pass his real estate; and devised such, (his) real estate to George Tibbits, Jacob L. Lane and John T. Mc Coun, upon trust for his children, and these gentlemen were also appointed executors. The will was proved by only two of them: Mr. Lane declining to act.

In March, one thousand eight hundred and thirty-five, the complainants, William T. Merritt and Isaac Merritt, purchased the property referred to in the bill (and which had been so taken in the name of the said Elisha Tibbits) of the Farmers Fire Insurance and Loan Company for thirteen thousand dollars; and paid down, as part of the consideration, the sum of four thousand four hundred dollars. By the agreement of purchase, the company were to give a good title and a deed with full covenants and warranty.

A deed of the premises, in the names of George Tibbits and John T. Mc Coun, as two of the executors of Elisha Tibbits, deceased, to the Farmers Fire Insurance and Loan Company, was made out, executed and acknowledged; and the widow of Mr. Tibbits released her dower to them by a quit claim deed. The Farmers Fire Insurance and Loan Company then executed and tendered a deed to the complainants: but the latter, through their counsel, contended that this would not perfect the title: 1. Because Elisha Tibbits bought for the company and he was a trustee for them and the property could not pass under his will, not being his own estate, and therefore it was necessary for the children of Elisha Tibbits to join (some of whom were infants;) and, 2. That even if the executors of Elisha Tibbits could give a conveyance, all three of them, being trustees, ought to join.

Mr. *Charles Edwards*, for the complainants.

Mr. *John L. Graham*, for the Farmers Fire Insurance and Loan Company.

Mr. *W. H. Bulkley*, for the infant children of Elisha Tibbits.

**THE VICE-CHANCELLOR:**—From the admissions in the answer of the Farmers Fire Insurance and Loan Company, and the proofs in the cause, it is very clear that Elisha Tibbits was merely the agent of the company, in making the purchase of the land in question, and that the title which he took in his own name was in trust for the company. Although there was no express acknowledgment or declaration of the trust in writing, yet a trust resulted by implication of law from the nature of the transaction, and which, by the Revised Statutes, in certain cases, is admissible and such as this court will enforce against the party and volunteers under him, but not to the prejudice of a purchaser in good faith for a valuable consideration and without notice of the trust: 1 R. S. 728, § 53, 54. Hence, Mr. Tibbits is to be regarded as the trustee of this property at the time of his death, with the legal title standing in his name, although for the benefit of the Farmers Fire Insurance and Loan Company.

The first question then is: whether the title passed to and vested in his executors by the devise to them contained in his will or whether it descended to his children as his heirs at law? If it went to the former, they were competent to convey to the company; but if to the latter, then nothing has yet been done to vest the company with the legal title from the heirs.

With respect to the legal estate which was vested in a testator as a trustee: the question has been presented in a great many cases whether it passed by the will; and the modern decisions appear to have established the rule that such legal estate will pass by such general words as are sufficient to comprehend it in legal construction, unless, from circumstances appearing on the face of the will, it can be collected that the testator meant to devise his own property only and not property which he held as a trustee. If this should be apparent from the will, the legal title of trust property will not pass by the will, although general words are used sufficiently comprehensive to embrace the lands: *Marlow v. Smith*, 2 P. W. 198; *Ex parte Morgan*, 10 Ves. 101; *Braybroke v. Inskip*, 8 lb. 417. The circumstances which weigh against the presumption are, a charge of debts,

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limitations in strict settlement or any other disposition inconsistent with the idea of its being trust property and which leads to the inference that the testator could not have intended to give the legal estate of such property: 3 Preston on Abstracts, 240.

In the present case, the will of Mr. Tibbits disposes of the property devised by it to the executors in such a way as show, very clearly, that the lands in question were not intended by him to pass by the devise. The bequest and devise are of the residue of his personal estate, after a portion is specifically given to his wife, and of "all my real estate whatsoever and wheresoever," unto the executors, in trust to sell, and, until sold, to improve and rent the same and to divide the rents, income and profits equally among his wife and children:—evidently intending thereby to give to his executors only such property as he held in his own right and which he could safely direct to be converted into money and distributed in his family and to be held and enjoyed by them absolutely for their own use.

If the lands in question are embraced in this devise, the executors take the same in trust for the purpose of a sale and distribution according to the will. But as this would be inconsistent with the trust which was in the testator and the equitable ownership in the Farmers Fire Insurance and Loan Company, the presumption is that he did not intend to include it in the general words "all my real estate;" and, consequently, the legal title did not vest in the executors by virtue of the will. It remained in the testator unaffected by that instrument and devolved upon his children at his death as his heirs at law. The executors, therefore, had no title in them to convey; and none passed by their deed to the company. It is unnecessary to consider whether the two executors, who proved the will and took upon themselves the office and trust, could make a sufficient conveyance, since, if they had all united in the deed, it would have been of no avail. The company should have looked to the heirs at law and procured from them a conveyance of the legal estate. Although some of them were minors, the company could have compelled a conveyance under the statute in relation to infant trustees: 2 R. S. 194, § 167, 168.

As it is not denied but what the complainants are entitled to a specific performance of their contract as against the company, the latter having tendered a deed on their part, although it was insufficient to pass the title, (because it was not in them) and as all proper parties are now before the court, there can be no difficulty in making a decree, which shall bind the rights of all and secure to the complainants an effective title.

The statute just referred to gives authority to this court to compel infants seized or possessed of lands in trust for others to convey and assure such lands to any other person in such manner as the court shall direct; and declares that every conveyance or assurance made pursuant to such order shall be as good and effectual in the law as if the same were made by such infants when of lawful age. This may be done on the petition of the guardian of the infant or of any person in any way interested. The complainants are here interested and the case is sufficiently before the court, upon the pleadings and proofs in the cause, to authorize its interference and to warrant a decree at once for this purpose.

The form of the conveyance must be settled by a master, to be executed by the children of Mr. Tibbits, as trustees in his place. Such of them as are under age will have to execute it by their guardian *ad litem*: *Livingston v. Livingston*, 2 J. C. R. 541. The Farmers Fire Insurance and Loan Company must be decreed to accompany the conveyance by a deed of release to the complainants; and, inasmuch as they have rendered this suit necessary by their omission or neglect to procure and convey to the complainants a good title in fulfilment of their contract, they must pay all the costs of this suit.

The following form of decretal order, as settled by the Vice-Chancellor, was entered:

" This cause coming on to be heard on bill taken *pro confesso* against the defendants, George Tibbits, Jacob L. Lane, John T. McCoun, Elizabeth Wait Tibbets and Margaret McCoun Tibbets; and on bill, answer, pleadings and proofs as regards all

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the other defendants; and upon hearing Mr. Charles Edwards of counsel for the complainants, Mr. John L. Graham, of counsel for the defendants, the Farmer's Fire Insurance and Loan Company of the city of New-York, and Mr. William H. Bulkley, of counsel for the infant defendants, and due deliberation having been had: **IT IS ORDERED, ADJUDGED AND DECREED** and the court doth hereby declare, that the complainants are entitled to a specific performance of the agreement of the seventeenth day of March, one thousand eight hundred and thirty-five, mentioned in the pleadings in this cause, and the same is decreed accordingly. *And it is hereby also declared* that the legal title of the lands and premises mentioned in the said agreement, which was in Elisha Tibbits now deceased and in the bill mentioned as a trustee for the said the Farmer's Fire Insurance and Loan Company, did descend, at his death, and has vested in his children the defendants Howard Tibbits, Tom McCoun Tibbits, Elizabeth Wait Tibbits, Margaret McCoun Tibbits and Sarah Matilda Tibbits as his heirs at law; and that the same lands and premises did not vest in his executors under the devise to them contained in his last will and testament. *And it is hereby further ordered, adjudged and decreed* that the said Howard Tibbits, Tom McCoun Tibbits, Elizabeth Wait Tibbits, Margaret McCoun Tibbits and Sarah Matilda Tibbits execute a conveyance to the complainants, the form whereof shall be settled and approved by Frederick De Peyster, Esquire, one of the masters of this court, and so that the guardian *ad litem* for such of the said children as are infants execute such conveyance on their behalf and as their act and deed; and that the said defendants the Farmers Fire Insurance and Loan Company execute a

deed of release to the said complainants of the lands and premises aforesaid, with covenants of title and warrantee, pursuant to the terms of the said agreement; and that, upon the delivery of such conveyance and release to the complainants, the said complainants shall execute and deliver to the said defendants the Farmer's Fire Insurance and Loan Company a bond and mortgage in fulfilment of and pursuant to the terms of the said agreement on their part. *And it is also hereby ordered, adjudged and decreed* that the said defendants, the Farmer's Fire Insurance and Loan Company, pay to the complainants their costs of this suit to be taxed; and also the costs of the guardian *ad litem* for the infant defendants to be taxed; and that the said parties respectively have execution for the same pursuant to the course and practice of this court."

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H. H. was one of the children and heirs of J. H. deceased. The latter, by will, devised all his real and personal estate to his executors; upon trust to convert the personality into cash and invest the proceeds; and to lease such part of the real estate as was situated within the city of New York, and, if deemed discreet, to sell that part of it which was out of the city. The rents and profits (to be received by his executors) were to form one general fund. An annuity and some legacies were given out of it; and all the residue of income of this general fund was to be divided equally among the heirs, who were named (among them, the above H. H.) and to be paid to them upon their own receipts. Upon the decease of either of the testator's sons before a partition, thereafter directed, leaving issue, such sons had power to appoint, by will, as to their proportions of the income; should either son die intestate leaving issue, then the same was to be paid to their respective widows for the support of themselves and their children; and if no widows survived them, then to the guardians of the children. After the expiration of twenty-one years from the date of the will and as soon as the executors should then deem it discreet, all the estate, real and personal, was to be divided, by the executors, among the testator's heirs or their legal representatives, the latter to take the share of their ancestor. In making partition, if both parents were dead and their children had attained the age of twenty-one years or were married, the share of the parent was to be partitioned amongst such children and paid over; and those who had not attained such age or were not married, their shares were to be invested and leased until such period or marriage and the dividends, &c. paid to their guardians. In making the partition, if both parents were alive and had issue, then, with regard to the personal estate forming the share of such parent (heir of the testator), the executors were to invest the same under the direction of the parent and pay it into the hands of the latter; and the real estate, forming the share of such parent, was to be leased during his life and the rents to be paid in like manner to him—and upon the decease of both parents, the personal property was to be paid over and the real estate divided as before directed in the case of the death of both parents before partition. In making the partition, where both parents were dead leaving no issue, the share of real and personal property, which would have fallen to the parent, was then to be distributed, according to the statute of distributions, among the testator's surviving children and their legal representatives. Two of the testator's heirs were appointed executors—one of them being the *cestui que trust* H. H. Held, that the absolute ownership of the personal estate was unduly suspended; and it was not an answer to the objection founded upon the statute to say that the events provided for might not arise. Also, that as H. H. was, here, a trustee as well as a *cestui que trust*, the trust, as to him, could not be supported.

Even if the trusts could be considered valid, H. H. had an interest which was liable to his creditors and the same could be reached by a judgment creditor. The exception in the statute relating to creditors bills (as to funds held in trust and proceeding "from some person other than the defendant himself") has relation to trusts authorized to be created for the benefit of the unfortunate, the infirm and the helpless and where the property has been placed in the hands of a trustee for the purpose of putting it beyond the reach of the *cestui que trust* or creditors.

October 15,  
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 Will.  
 Trusts.  
 Debtor and  
 Creditor.

A judgment creditor's bill, filed after an execution had been returned unsatisfied.

The object of it was to reach the share and interest of the debtor in the estate left by his father, John Hone, deceased;

and to have it applied, as far as might be necessary, to the payment and satisfaction of the complainant's judgment. And for this purpose, the bill set out the will of John Hone, dated on the thirty-first day of July, one thousand eight hundred and thirty, by which the testator had devised all his estate, real and personal, to his executors, in joint tenancy, or to such of them as might take the office. The declared purposes of the devise to the executors were, that they should convert all his personal property into cash with all convenient speed after his decease (except what he had otherwise specifically disposed of;) and invest the proceeds in bonds and mortgages or stock of the United States. And with respect to his real estate, they were to let, lease and demise all his real estate in the city of New York in such manner as to yield the largest income. And after one year from his decease, if they should deem it discreet, they had power to sell all his real estate lying out of the city of New York; and invest the proceeds thereof in bonds and mortgages or stock of the United States or of the state of New York, to the end that the rents and profits, interest and dividends, accruing from his whole estate, might form one general fund for the purposes of the will. The fifth clause of the will then directs the executors, out of the fund so created, to pay unto his wife an annuity during life and another, of a small amount, to another person; and, by a codicil, several legacies given to grandchildren are also to be paid out of the fund. The executors are then to divide all the residue of the income, from time to time, as it might accrue equally among his heirs, naming them, that is to say, the whole of the said income, after deducting the annuities and legacies, is to be divided into nine equal parts, one of which is to be paid to each of his children (the defendant, Henry Hone, being one of them) or their several legal representatives. Some grand-children, who are children of two deceased sons of the testator, come in for two of the ninth parts.

The sixth clause of the will directs the executors to pay the said several shares of the income to the parties severally entitled in quarter-yearly payments until a partition of the estate, as afterwards directed. Such payments to be made

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to his sons upon their own receipts and to his daughters upon their receipts, notwithstanding coverture—while the income of the shares going to his grand-children are to be paid during their minorities upon the receipt of their mother or legal guardian and upon their own receipts when they become of age. By the seventh clause, the will directs that, upon the decease of his sons or either of them leaving issue and before the partition afterwards directed, the proportion of the income directed to be paid to his sons respectively shall then be paid in such way as such son dying should, in and by his last will and testament, direct; and should a son or sons die intestate leaving issue, then the same to be paid to his or their respective widows for their support and the support and education of their children respectively. If there be no widow surviving a son then to be paid into the hands of a guardian of the children to be duly appointed—and so with respect to the shares of daughters in case of death before partition leaving issue, the same to go to their husbands surviving; and if husbands be dead, then to the children or their guardians.

In the eight section: After the expiration of twenty-one years from the date of the will and as soon as the executors shall then deem it discreet, all the estate, real and personal, to be divided by the executors or the survivors or survivor of them among his said heirs or their legal representatives, such legal representatives to take such share only among themselves as their immediate ancestor would have been entitled to, if living. The ninth clause contains directions to be observed in carrying the partition into effect; first, where the real estate is so circumstanced that an equal partition can be made without converting the same into cash, a sale is to be avoided—and, second, in making the partition of both real and personal estate, if both parents be dead and their children or any of them have attained twenty-one years of age or are married, the share which would have fallen to the parent shall be equally partitioned among the children of the deceased parent, and as to such as shall have attained the age of twenty-one years or are married, the fee of such real estate as may fall to them is to be conveyed accordingly, and such part of the personal, as may fall

to them respectively, to be paid over. And as to such as may not then be of age and unmarried, their respective shares of the personal are to be invested on bond and mortgage or in stock; and their shares of the real estate to be leased until they attain the age of twenty-one years or marry—and the dividends, interest and profits to be paid to them or their guardians in the mean time—and when either of those events happen, their shares of the personalty are to be paid over and, of the realty, to be conveyed in fee. Third, in making the partition, if both parents are alive and have issue, then, with regard to the personal estate forming the share of such parent (son or daughter of the testator) the executors are to invest the same under the direction of his son or daughter, on bonds and mortgages or in stocks, so as to yield the largest income, and pay the same into the hands of such his son or daughter quarterly in the same manner as directed with regard to payments of the income to be made before partition. The real estate, forming the share of such parent son or daughter, is to be leased by the executors during the life of such parent and they are to pay the rents in like manner to him or her—such payments, in the event of the death of such son or daughter leaving a widow or husband surviving, to be in all things regulated as above directed with reference to the payment of the shares of such income before such partition; and upon the decease of both parents, then the personal property to be paid over and the real estate to be divided as is before directed in the case of decease of both parents before partition. Fourth, in making the partition, where both parents are dead leaving no issue surviving, the share of real and personal property which would have fallen to or might have been allotted as the share of the parent, son or daughter, should then be distributed according to the statute directing the distribution of the property of intestates among the testator's surviving children and their legal representatives. Fifth, and the same rules, in all things, were to be observed where real estate has been converted into personalty by a sale;—the interest and dividends upon investments to stand in the place of rents of the realty.

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These are all the parts of the will and codicils which it becomes necessary here particularly to notice.

The testator appointed his wife an executrix and his two sons (the defendant being one of them) and two of his sons in law, executors of his will. The complainant in his bill alleged that the debtor, Henry Hone, was entitled to and in the receipt of a large share of the rents and income of both the real and personal estate, and had a right to a share of the capital of the estate upon a division thereof; and of all which the complainant prayed a discovery.

The defendant, Henry Hone, demurred to so much of the bill as sought a discovery, as well as to the relief; and assigned for cause of demurrer, that it appeared by the bill that such estate, property, interest, annuity, rents, issues and profits were derived from and by means of a trust created by or a fund held in trust, which had proceeded from a person other than the defendant, and that the bill had not made such a case as entitled the complainant to any discovery or relief in respect to any of these matters.

*Mr. Murray Hoffman*, in support of the demurrer.

*Mr. George Wood*, for the complainant.

March 22,  
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THE VICE-CHANCELLOR:—This demurrer necessarily leads to an examination of the will of the late John Hone, and of such of the provisions of the Revised Statutes as are supposed to be applicable to it, for the purpose of ascertaining whether the defendant has such an interest under his father's will as is liable to be applied, by the court, to the payment of debts in judgment against him—and if so, the extent of such interest?

The will is complicated in its provisions; and there is considerable difficulty in getting at the precise object and meaning of the testator. After a careful perusal, however, it appears to me that the following synopsis may be presented as containing all that is necessary to be considered in relation to the defendant's rights and interest under the will—and which are now alone in question.

The devise is of the whole estate, real and personal, to

the executors in trust. The legal title of the lands in fee, as well as of the personal property, is vested in them in joint tenancy. The law permits the legal estate to vest where the executors or trustees are empowered, as they are in this case, to receive the rents and profits: 1 R. S. 729, § 56, 60. The lands lying out of the city of New-York are, by the directions concerning the sale and disposition of the proceeds, converted into personal property and pass as such to the trustees, upon the principle that real or personal property is to be considered as of that species into which it is directed to be converted: *Leigh & Dalzell*, 48, 59.

The income derivable from the investment of the personal property and of the proceeds of that portion of the real estate which is converted for this purpose into personal, together with the rents of the remaining real estate in the city of New-York, which the executors hold in trust, constitutes one general fund for the payment of annuities and legacies; and after such payments are made, the residue is to be divided into nine equal parts or shares. The defendant is the *cestui que trust* of one such share, which is to be paid over to him on his own receipt, from time to time, in quarter-yearly payments. The trust, in this respect, is to continue and the payments are to be made until a partition or division of the capital of the estate takes place, and which may be at any time after the lapse of twenty-one years from the date of the will. During this period, the capital of the estate, both real and personal, remains entire. It cannot be alienated.

Upon such division or partition being made, the trust still attaches to the shares in severalty. If the defendant is living at that time, the trust of the share allotted to him is to continue during his life and the life of his wife, if living; and after his death and his wife's death, then, as to the shares upon a subdivision, among his children during the minority of his children or until they respectively attain the age of twenty-one years or marry, whichever event may first happen.

The nature of the trust in relation to the personal property is that the trustees are to invest it, under his direction, in bonds and mortgages or stocks and to receive the interest

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and dividends : and the real estate set apart to him in the division, the trustees are to demise and let and to collect the rents, and the rents, interest and income arising from both the real and personal property the trustees are to pay over to the parties entitled under the trust in the order of their becoming entitled and where they happen to be infants, then to their guardians.

The grand-children of the testator are the persons ultimately to take by representation or *per stirpes* : but neither the real estate nor the personal property is to vest absolutely in them in possession, nor is the trust to cease except upon the event of their attaining full age or marriage. If there should be no such grandchild living to take the share allotted to the defendant, such share is to go in the legal course of descent and distribution to the surviving children of the testator and the trust will then also terminate.

There is one clause of the will which may operate to modify, in some measure, the trust of the sons shares of the estate, consequently embracing the defendant's share. In the event of his death before partition, leaving issue, he has power to appoint, by will, as to the way in which his one ninth of the rents and income shall be disposed of; but should he die, without making such appointment, leaving issue, then such share is to be paid to his widow for her support and the support and education of their children; and if there be no widow surviving, then the same is to be paid into the hands of a guardian of the children. It is only the power of appointment which can have the effect above alluded to. In other respects, this provision appears to be in conformity with the trusts generally of the will.

The question then arises, whether the trust expressed in this will, in relation to the defendant's share of the estate, is such as the present law authorizes?

The real and personal property are blended in the same trust; and as far as respects the personal property, the objection to it is that it suspends the absolute ownership for a longer and different period than is allowed by law.

The statute declares that the absolute ownership of personal property shall not be suspended, by any limitation or condition whatever, for a longer period than two lives in

being at the death of the testator, where the limitation or condition is by will; and in all other respects, limitations of future or contingent interests in personal property shall be subject to the rules prescribed in relation to future estates in lands: 1 R. S. 773. Now, according to my understanding of the will, as just explained, the absolute ownership is unduly suspended.

The trust which operates as a suspension is to continue during the successive lives of the defendant and of his widow, if he shall leave one, and also during the minority of his children afterwards or until their marriage, provided events shall occur to render a trust to this extent, in point of time, necessary—such as his leaving a wife surviving him and a child or children under age and unmarried at the death of his wife. And it is no answer to the objection founded upon the statute to say that such events may not arise to render it a trust of that duration.

It is a rule of the common law that an executory devise which may postpone the vesting of an estate beyond lives in being and twenty-one years afterwards is not capable of being supported upon the possibility that the estate may vest sooner: *Griffiths v. Vere*, 9 Ves. 134; and so, trusts for accumulation being too remote (not within the statute 39 and 40 Geo. 3. called "The Thelluson Act") and void in their creation, are incapable of modification so as to establish them to the extent to which they might have been originally carried: *Lord Southampton v. The Marquiss of Hertford*, 2 Ves. & B. 54: This principle applies to the present case; and although, possibly, the will may never take effect in the way contemplated and provided for in its terms, yet, as the testator could not lawfully create such a trust in reference to his personal property, it cannot be allowed to have effect for any purpose.

It is unnecessary to examine the trusts of the will any further in relation particularly to the personal property. There are other considerations which present themselves respecting the trust in question and which can more properly be disposed of in reference to the bearing it has upon the real estate and the rents and profits forming a part of the trust fund.

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Express trusts, to be valid, must be such as are authorized by the Revised Statutes. No other can lawfully be created; and the purposes for which they may be created are specified in 55 § of the article concerning Uses and Trusts.

If the trust in question, so far as it relates to the defendant's share of the rents and profits of the real estate, comes under either head of trust mentioned in that section, it is the third: "to receive the rents and profits of land and apply them to the use of any person during the life of such person or for any shorter term, subject to the rules prescribed in the previous article on the subject of the creation and division of estates."

It is objected, in the first place, that this trust is not within the statute and cannot, therefore, be supported: because the character and object of the trust are not such as the statute contemplates; and, secondly, the extent or duration of the trust, as declared in the will, is of itself an infringement of the statute.

For a judicial exposition of this famous section of the statutes and particularly of the third subdivision in relation to the nature and object of the trust which it authorizes and was intended to embrace, I need only refer to the opinions recently delivered in the court of Errors in the case of *Coster v. Lorillard*.

Although there is a diversity upon some points in the opinions delivered in that case, there are certainly leading principles established by the decision which will stand as landmarks in the creation of express trusts under the third subdivision of the fifty-fifth section; as well as in relation to the creation of estates. The principles about which the judges do not materially differ, as applicable to trusts of this class, appear to be these: that they are intended to provide for minors, married women, lunatics and spendthrifts, and, consequently, are active trusts, requiring the intervention and agency of a trustee, who is to have the whole management of the property and in whom the whole legal title and estate is to vest and where the person, for whose benefit the trust is created, shall have no estate whatever and only a right to enforce the trust in equity—that the trustee must be some third person and not the *cestui que trust* himself,

who, from the very nature and object of the trust and the real necessity of the case, cannot be his own trustee. To constitute the same person a trustee for his own benefit is to create a mere formal trust which is defined to be a trust where the right in equity to take the rents and profits of land is in one person as beneficial owner and the legal estate is vested in another as trustee to hold or convey as the beneficial owner may direct. The legal estate being thus in one person and the equitable estate, with the power of controlling the legal estate, being in another, this kind of trust, producing, in the view of a court of equity, a separation into a legal and equitable title and estate, it was the design of the statute to eradicate and to allow no trust to be created except where the whole title and estate, both in law and equity, should vest in the trustee and where, to authorize a trust under the third subdivision of the fifty-fifth section, there must be a necessity for active duties to be performed by such trustee owing to the unfortunate condition of the person to be benefitted or a legal disability or incapacity rendering such party unfit to be trusted with the management of the property or fund.

With respect to the phraseology necessary to constitute a trust, whether it should strictly follow the words of the statute to receive the rents and profits and apply them to the use of the person in order to be valid or whether it is sufficient to authorize or direct the trustee to pay over the rents and profits, is a matter about which there is an apparent difference of opinion among the judges and which would seem to leave the point undecided.

I apprehend, however, it will be found that whenever a trust is declared which, in other respects, is clearly within the statute in its object and design, it can make little or no difference which way it is expressed, whether to apply to the use of or to pay over. The latter direction may be one mode of accomplishing and fulfilling the words of the statute in a proper case and under particular circumstances of which the court must judge.

In the Lorillard Will, the trust, as declared, was considered objectionable and unauthorized by the statute, not merely because the direction was to pay over to the *cestui*

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*que trust* the shares or dividends of the rents and income, but also because the twelve nephews and nieces, who were thus provided for as beneficiaries under the trust, were themselves all trustees. This circumstance showed it to be a trust of such a character as the statute had abolished. It was in the nature of a formal trust at common law and not of a kind which the statute had authorized to be created where the whole estate vests in the trustees, requiring active duties to be performed by them in behalf of other persons not trustees, who are incompetent or unable to manage property for themselves. So, upon the same principle, the trust in the present case must be deemed invalid. The defendant, Henry Hone, is one of the trustees to whom the estate is devised, at the same time he is made a *cestui que trust* of one ninth of the rents and profits. He is, thus, in form, a trustee for himself, which is inadmissible. If he is capable of managing the property in one capacity, he is competent to be the absolute owner in another; and there is no necessity for any trust in relation to him. It is not a case, therefore, within the statute, and, of course, the trust, as to him, cannot be supported.

But supposing it to be a case in which a trust might lawfully be created and the trustee and *cestui que trust* not the same person, the other objection, which has been taken in regard to its duration, appears to be equally fatal to its validity. Trusts authorized by the third subdivision of section fifty-five, which we are considering, may be created to endure during the life or lives of the persons to be benefitted or for any shorter term, subject to the rules prescribed in relation to estates. The object of this is to limit the trusts in such a manner as that they may not operate to suspend the power of alienation beyond the period of two lives in being at the creation of the estate as prescribed in the previous article. That prohibition is held to apply to the creation of present as well as future estates. Hence a trust which would tie up the estate and prevent its alienation for more than two lives, if it were suffered to stand, is now contrary to law.

In the case of the Lorrillard Will, the trust was for the lives of twelve persons and the survivors and survivor of

them ; and it was, consequently, held to be void as unduly suspending the aliening power upon the estate. The trust in the case now before the court is not directly or immediately for a life or lives. It is for an absolute term of twenty-one years in the first instance, during which the property cannot be partitioned or sold. This term may not extend beyond two lives ; but the uncertainty, in this respect, and the possibility that it may endure longer constitutes the objection to it. Besides, the statute has not expressly authorized the creation of a trust for a gross term of years ; and what the statute has not either expressly or by clear intentment authorized cannot be sanctioned. It is true, a trust may be for a life or lives "or for any shorter term:" but the term here meant is such as must necessarily fall within the period of the designated life or lives and cannot be so limited as, by possibility, to reach beyond.

In the case of *Hawley v. James*, before the Chancellor, 5 Paige's C. R. 318, upon the will of William James, a trust term in the whole estate was devised to trustees and which was to continue until the youngest of the testator's grandchildren, living at the date of the will and attaining the age of twenty-one years, should attain that age ; and, in the mean time, there was to be no sale or division of the bulk of the estate. At the date of the will, the youngest grandchild was about one year old, so that, if he lived, the trust was to endure about twenty years. A question arose upon the validity of this trust ; and the chancellor held, although with some hesitation, that such a trust term so limited as in no event to continue longer than the actual minority of infants in being at the creation of the estate and who have an interest therein either vested or contingent, is not necessarily invalid. A trust term, if created for the benefit of infants in being, who are designated in the trust and made with reference to minority and to terminate therewith or with the life or lives under age is, of course, a trust for a life or lives or for a shorter term and is, therefore, unobjectionable. But this is very different from a trust of a term in gross, as in this instance for twenty-one years absolute and without reference to lives or the minority of infants.

There are further objections to this trust, as it concerns

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the real estate, similar to those which have been stated in considering it as a trust of the personal property and resting upon the same grounds, namely, that it is calculated to suspend the power of alienation for a longer time than the duration of two lives in being or of two successive life estates. A trust, which contravenes the statute in this respect, is as much void as the creation of an estate which, if allowed to stand, would have the like effect.

Upon the whole, therefore, so far as the defendant's interest in his father's estate is attempted to be locked up by the trusts of the will, I think the conclusion must be that they are void.

But if it were otherwise and the trusts of this will should be deemed valid in law and such as the court could sanction, I apprehend it will still be found that the defendant has an interest under the trusts and a benefit resulting from the property which is liable to his creditors. The 57 § in the article of the statute, concerning Uses and Trusts, declares that where a trust is created of rents and profits and no valid direction for accumulation is given, the surplus beyond the sum that may be necessary for education and support shall be liable, in equity, to the claims of the creditors of the *cestui que trust* in the same manner as other personal property which cannot be reached by an execution at law. The present was not intended to be a trust for accumulation; and the defendant's interest in the rents and profits beyond what is necessary for his support is, by this enactment, subjected to the payment of his debts—not at law however, because it cannot be taken on an execution—but, in equity, where it can be reached in the same manner as personal property of a debtor not tangible at law. It is put upon the same footing as that species of property and is liable to be operated upon in the same manner by the power of this court.

What, then, is the power and jurisdiction of this court in such cases? This is, likewise, now declared by statute. In order to form a correct understanding of the statutory provision on this subject, it is necessary to look at the reasons for its introduction. The precise grounds of this court's jurisdiction at common law and how far it could properly

exercise its power in favor of a judgment-creditor, over equitable interests, mere choses in action or other property of the debtor which, from its nature, was beyond the reach of legal process, had become a matter of some uncertainty, in consequence of the difference of opinion expressed by the judges in the final decision in *Hudden v. Spader*, 20 J. R. 554, and of the views entertained by Chancellor Sanford in the case, which was soon afterwards decided by him, of *Donovan v. Finn*, Hopk. R. 59.

Mr. Justice Marcy very clearly pointed out the distinction in the doctrine of these cases in 3 Wend. R. 621; and has shown that those decisions have left it an open question whether the court of chancery had jurisdiction to compel a debtor, against whom a judgment at law was recovered and an execution returned unsatisfied, to discover money in the funds, mere choses in action or equitable interests of every sort and apply them to the payment of the debt, without special circumstances amounting to fraud in withdrawing his property from or placing it beyond the reach of his creditor at law or from which to raise a trust in favor of his creditor or, in other words, whether the court could only assume jurisdiction in favor of the creditor through the medium of fraud or trust clearly made to appear.

In *Hudden v. Spader*, the opinion of Mr. Justice Woodworth, which was concurred in by Ch. J. Spencer and a large majority of the court, proceeds upon the broad ground that chancery has jurisdiction in such cases to reach every species of property of the debtor without regard to circumstances of fraud or trust. But it is certain that a doctrine to that extent was not necessary to the decision made in *Hudden v. Spader*: for it was clearly a case of a fraudulent withdrawal of the debtor's property and means from the reach of his creditors by the ordinary process of law, and that was enough to give the court jurisdiction.

In *Donovan v. Finn*, however, there were no circumstances from which to infer fraud or to raise a trust. These, Chancellor Sanford considered to be the only legitimate grounds of equitable jurisdiction to control the debtor in the disposition of his property after a judgment and execution had proved unavailing; and as *Hudden v. Spader* did not

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call for a decision on any other ground, he deemed it not a binding authority beyond it.

The Revisors were fully aware of the extent of the doctrine advanced in *Hadden v. Spader* and of the limit put upon it in *Donovan v. Finn*; and they proposed, therefore, to settle the question, as to the jurisdiction and power of this court, upon the basis of the former decision (see the Revisor's notes.) For this purpose, two sections of the statute were prepared and submitted to the legislature. The first declared the jurisdiction, by saying, at what time a judgment creditor may file a bill and for what purposes, namely, for discovery and an injunction; and the second proceeded to define the powers of the court in the exercise of that jurisdiction. These sections were mainly declaratory of the common law powers and jurisdiction of the court and were doubtless so intended; but, supposing the case of *Donovan v. Finn* to contain the true principles upon which that jurisdiction was founded, and I think Chancellor Sanford has successfully shown it to be so, then, so far as the doctrine advanced in *Hadden v. Spader* went beyond that of *Donovan v. Finn* and as the two sections, referred to, proposed to adopt and carry out that doctrine fully, they may be considered new in part and as conferring upon this court a more extensive jurisdiction and greater powers than it before possessed. This is so with respect to mere choses in action and money invested in stocks unaccompanied by any lien or circumstance of fraud. But, with regard to property or funds belonging to a debtor in the hands of a third person to which an equitable lien in favor of a judgment-creditor could be said to have attached or concerning which a trust could be implied, the jurisdiction of this court at common law was sufficient to reach and apply it in satisfaction of the judgment. The observations of Lord Hardwicke in *Edgell v. Haywood*, 3 Atk. 356, marks the above distinction: for there, upon the equity of a statute subjecting the future acquisitions of an insolvent debtor, whose person was discharged, to the payment of his debts, Lord Hardwicke held that chancery had power, upon a bill filed by a judgment-creditor, to decree satisfaction out of a legacy bequeathed to the debtor, but still remaining in the hands of the execa-

tor; although, as a chose in action merely and upon that ground alone the judgment-creditor could not come into this court for satisfaction out of the legacy, because the ordinary methods of compelling satisfaction, by writs of *ca. sa.* or, where the defendant could not be taken, by proceeding to outlawry and sequestration, were supposed to be sufficiently efficacious.

Thus, by looking back to the limit which the court of chancery had prescribed to itself, we are enabled to perceive how and in what respect its jurisdiction was proposed to be enlarged, by vesting it with power "to compel the discovery of any property, money or thing in action belonging to the defendant and of any property, money or thing in action due to him or held in trust for him and to decree satisfaction out of what might be discovered, whether the same were originally liable to be taken in execution at law or not." But the legislature did not adopt the proposed sections without alteration and amendment. So far as property, money or things in action held in trust for a defendant were likely to be affected, the sections were amended by introducing the words, "except where such trust has been created by or the fund so held in trust has proceeded from some person other than the defendant himself."

The question then is as to the effect of this exception?

This statute, it may be observed, is a remedial one; and it is chiefly declaratory. In some respects, however, as already shown, it is introductory of new law, conferring additional powers upon the court of chancery. But lest its broad and general terms, which expose all possible rights and interests of a party against whom a judgment is rendered to the searching operation of a creditor's bill, might have a tendency to break up trusts authorized to be created for the benefit of the prodigal, the infirm and the helpless under the so often quoted 55 §, this saving clause was introduced and for greater caution adopted. The object was to prevent express trusts proceeding solely from the bounty of a parent or of some third person, and valid in their creation under the statute, from being overthrown or diverted from their object by these creditors bills. It was enough to say that all, beyond necessary support, where the trust is not for

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CRAIG  
v.  
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## CASES IN THE

... should be liable to the creditors of the *cestui* ... Such surplus may be reached by a bill in equity, ... itself cannot be disturbed. I think the exception in the statute, under consideration, must be understood with reference to this state of things and was meant to have a lesser or greater effect. Chancellor Walworth has expressed the same idea in *Le Roy v. Rogers*, 3 Paige's C. R. 556; where, speaking of the exception, he says, it probably was intended to protect property the subject of an express trust created by a parent or relative in behalf of or for the support of an unfortunate child or relation and which property had been placed in the hands of a trustee for the purpose of putting it beyond the reach of the *cestui que trust* or creditors.

To give it this application is to render the several parts of the statutes, relating to trusts and to proceedings upon creditors bills, consistent with each other. It follows, then, from this view of the subject, that notwithstanding the language of the exception or saving clause of the statute, the surplus income of a trust estate, valid in its creation, and beyond what is necessary for the education and support of the *cestui que trust*, may be applied, by the decree of this court, to the payment of debts contracted by him; and that property, money or things in action, held in trust for a debtor, if not such a trust as the law has expressly authorized, is equally liable to be so applied.

This disposes of all the questions which have been raised by the demurrer in this case.

I have thought it proper to present my views thus far, after the delay which has occurred, principally on account of the opportunity it might afford of profiting by the final decision in the case of the Lorillard Will. Still it may possibly be that I have profited but little from a perusal of the opinions in that case, in forming the conclusion I have arrived at in relation to the trusts of the present will.

My purpose, however, is not at this time to pass judgment upon the will or the law of the case any further than merely to determine whether the defendant is bound to answer the bill filed against him to reach the share or interest which he may have or be entitled to in his father's estate and liable

to be applied to the payment of debts in judgment against him. Believing he has such an interest, upon the ground in the first place that the trusts of the will are such as cannot be supported in law; and secondly, if the trusts are valid that there may be a surplus of income belonging to the defendant which is liable in equity to the demands of creditors, the demurrer must be overruled, with costs.

1835.  
GAINES  
v.  
WINTHROP.

GAINES v. WINTHROP and others.

A contract to sell lands is a revocation, *pro tanto*, of a prior will: but the latter remains in force as to the legal estate; the title passes to the devisee; and he will be a trustee for the purchaser and compelled to convey.

Bill for a specific performance of the sale of lots of ground. December 9.  
Egerton Leigh Winthrop was seized of the property; and 1835.  
while he was ill, his brother, as his agent, signed an agree-  
ment for the sale of the lots to the complainant, Marquis *Specific per-*  
D. L. Gaines. Prior to this time, Egerton Leigh Winthrop *formance.*  
had made his will. He afterwards died. The question *Will.*  
was, as to where the complainant was to look for title?

Mr. J. P. Hall, for the complainant.

Mr. Hamilton Fish, for the executors and devisees of  
Egerton Leigh Winthrop.

THE VICE-CHANCELLOR:—The contract for sale is sufficiently proved; and enough was done to render it binding upon the testator, and the complainant is entitled to a specific performance of the same.

But the question is: where shall he look for title—who is to execute the proper conveyance? The rule is that a contract to sell is a revocation in equity *pro tanto* of a prior will. Still, as to the legal estate, the will remains in force;

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**FARRINGTON**  
 v.  
**FREEMAN.**

the title passes to the devisee and he will be considered a trustee for the purchaser and compelled to convey in fulfilment of the contract: 1 Preston on Abs. 67 ; 3 ib. 260 ; 1 Sugden on Vendors, 183. (9 ed.) The devisees in this case are the persons to execute a deed to the complainant.

Decree accordingly.


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**FARRINGTON v. FREEMAN, et al.**

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Although a judgment is obtained through a bond and warrant of attorney yet a complainant, wishing to restrain proceedings under it, must make a deposit or give security under the statute relating to injunctions to stay proceedings in personal actions.

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**January 4.**  
 1836.  
  
*Practice.*  
*Injunction.*  
*Security to*  
*stay action.*

Motion for an injunction to stay proceedings on a judgment obtained upon a bond and warrant of attorney, without deposit or giving security under the statute.

Mr. A. Nash, for the motion.

Mr. Soper, contra.

**THE VICE-CHANCELLOR :—**The statute provides that no injunction shall issue to stay proceedings at law in any "personal action," after judgment, unless a deposit is made of the amount, &c. or a bond in lieu thereof is given: 2 R. S. 189, § 141 ; and the question is, whether a judgment on a bond and warrant of attorney given by the complainant and wherein an execution has been issued is a judgment in "a personal action" within the meaning and intent of the statute. If it be not, the complainant asks for the injunction without depositing the amount or giving security—there being equity enough in the bill to support an injunction. But if the statute applies to such a case, it is imperative.

and the injunction cannot be granted unless its provisions are satisfied.

An action is defined to be the legal demand of one's right; and when it is brought to recover a debt, damages or personal property it is called a personal action. The complainant contends, however, that in giving a bond and warrant of attorney and entering up a judgment upon them there is no action in the sense here used—that no suit is pending—and that it is to be viewed merely as a mode of giving security or of creating a lien of record, like giving a mortgage to be recorded with a power of sale; and the expressions of Sutherland J. in *Livingston v. Harris*, 11 Wend. 332, are relied upon. I cannot consider this a correct view of the subject or that what fell from the judge, in the case referred to, has such a bearing. Although no suit is pending when a bond and warrant of attorney are given, yet the very language of the latter instrument anticipates and recognizes the proceedings to be had by virtue of it as an action at law. It authorizes an attorney to appear for the party in some court of record at the suit of the obligee in the bond there to receive a declaration in an action of debt on the bond, &c. and to confess the same action or to suffer a judgment to pass against him by default: *Dunlap's Pr.* 358; 2 Archb. Pr. 12. A declaration is then filed; an attorney, under the authority, signs common bail-piece, which is the appearance, and *cognovit actionem*. The whole assumes the shape and form of a suit. There is a plaintiff and defendant—a record of the proceedings to judgment. Costs are taxed, consisting of the attornies fees in a suit at law—and judgment is rendered for debt and costs as in any other suit or action, and execution issues in the usual form. I am at a loss to perceive how it can be considered otherwise than a judgment in a personal action; and I know of no reason why the statute should not apply where a party has voluntarily authorized a judgment to be entered up against him as where a judgment has been recovered by a hostile proceeding. The mischief which the statute was intended to remedy may as well exist in the one case as in the other.

It is clear to my mind that the injunction cannot issue, without deposit or bond.

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FARRINGTON  
v.  
FREEMAN.

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NICOLL

v.

NICOLL.

NICOLL and others v. NICOLL.

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A judgment for costs will not be off-set against another judgment so as to divest the lien of the attorney for costs, in the first mentioned judgment. The court will protect such lien.

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*February 15,* Question: whether judgments could be set-off, so as to  
*1836.* destroy the attorney's lien for his costs?

*Attorney.*  
*Judgments.*  
*Set-off.*

In the month of February one thousand eight hundred and twenty-nine, a judgment had been obtained by the complainants, executors of Nicoll, against Richard F. Nicoll, the defendant herein, for sixteen thousand nine hundred and sixty-five dollars and ninety-five cents damages and costs; and which judgment formed part of the estate of their testator and belonged to his residuary legatees and devisees Ann W. Nicoll, Glorianna M. Nicoll and Arabella J. F. Nicoll.

In May Term one thousand eight hundred and twenty-nine Richard F. Nicoll obtained a judgment in ejectment against the said devisees; and the costs were taxed at one hundred and sixty-six dollars and eighty-nine cents. Richard F. Nicoll had become insolvent and had never paid his attorney those costs.

Bill now filed to restrain the collecting of costs upon the judgment in ejectment; and to compel a set-off, as far as they would extend, against the first mentioned judgment.

An injunction had been granted by the injunction-master; and a motion was now made, upon bill and answer, to dissolve it.

Mr. Charles B. Moore, for the motion.

Mr. W. N. Dyckman Jr. for the complainants.

THE VICE-CHANCELLOR :—This motion may be considered as coming from the attorney of the plaintiff in the ejectment

suit (the defendant here) ; and the question is whether there can be a set-off to the exclusion of the attorney's lien for his costs ?

Upon hearing this motion, I was under the impression that the courts always looked to the lien of the attorney and refused to allow a set-off to his prejudice. But, Chancellor Kent, in *The Mohawk Bank v. Burrows*, 6 J. C. R. 317, followed the practice of the court of Common Pleas in England and the doctrine, as he thought, of the chancery there and sanctioned a settlement between parties without regard to the lien of the attorney or solicitor. I am satisfied, however, after looking into all the cases upon the subject, that a different rule is now established in this court. Chancellor Walworth, in *Dunkin v. Vandenberg*, 1 Paige's C. R. 622, appears to me to hold the right doctrine. He says "it has repeatedly been decided in the Supreme Court that the attorney's lien will prevent one judgment from being set-off against another in such manner as to deprive him of his costs"; and refers to *Cole v. Grant*, 2 Caine's R. 105, and *Devoy v. Boyer*, 3 J. R. 247 for the rule which prevails in the King's Bench in England, in preference to the contrary rule of the Common Pleas, which Chancellor Kent, in the *Mohawk Bank v. Burrows*, (6 Johns. Ch. R. 317) supposed from what had been said in *Porter v. Lane* (8 Johns. R. 357) to be the doctrine of our Supreme Court, and he remarks that Chancellor Kent, in coming to that conclusion, had evidently overlooked the cases of *Cole v. Grant* and *Devoy v. Boyer*. It is a little remarkable that the present Chancellor, while detecting Chancellor Kent in this oversight, of cases, should himself have not seen or noticed the case of *Cooper v. Bigalow* (1 Cowen, 206.) Here, the Supreme Court seems to have gone upon the same rule which governs the practice of the Common Pleas in England; and to have lost sight of the previous decisions in *Cole v. Grant* and *Devoy v. Boyer*.

The case was this : Cooper had a judgment against Bigalow and Searls for one hundred and twenty-four dollars and sixty-eight cents, whereon they were imprisoned under a *ca. sa.* Bigalow had a verdict of six cents against Cooper

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NICOLL  
v.  
NICOLL.



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**NICOLL**  
**v.**  
**NICOLL.**

and Henry for an assault and battery, on which the plaintiff was entitled to full costs. On account of the imprisonment of Bigalow and Searls in satisfaction of the debt, the court had refused to allow the set-off, (see 1 Cowen, 56); but when it finally came up, both Bigalow and Searls having been discharged from imprisonment under the insolvent act, the court granted the set-off without regard to the attorney's lien or right to the costs.

This contrariety of decision in the Supreme Court upon the same point, sometimes following the King's Bench in England and then again the Common Pleas rule and practice, and the apparent collision in the views of the late and present Chancellor, would be extremely embarrassing to me did I not feel myself bound to follow the latter. *Dunkin v. Vandenberg* is a sufficient and controlling authority for this court and the principles there laid down appear to be just and equitable in relation to the attorney or solicitor. Costs are made up of fees allowed by law for services which the attorney or solicitor and the other officers of the court perform at his instance, and which he either disburses in the progress of the suit or becomes personally liable for. It may, therefore, be said, they belong to the attorney or solicitor. He has a lien for them upon the papers and property of the client which come to his hands, so long as he chooses to retain possession.

When the costs are included in a judgment, his equitable interest in the judgment to that amount remaining unpaid to him by his client is, at least, equal to any equity of the opposite party in a set-off of a separate and independent debt; and to this may be added his legal right to controul the payment of such costs to him by giving notice not to pay them to his client and by issuing execution upon the judgment. (*St. John v. Diefendorf*, 12 Wend. 261.)

But if a set-off of the judgments were proper in this case, why was not the application made to the Supreme Court? There surely was no necessity for filing a bill here. I am not, however, to dispose of the merits of the case upon this motion. The complainants, perhaps, will see the propriety of voluntarily dismissing their bill; and if they shall think proper, can still make their application to the Supreme Court.

Injunction dissolved.

1836.

VAN GELDER  
v.  
POST.

VAN GELDER v. POST and others.

In a suit for dower, proof of actual solemnization of marriage is not necessary. Evidence of cohabitation, general repute, acknowledgment of the parties, reception in the family and other circumstances from which a marriage may be inferred, will be sufficient. A woman cannot be deprived of her dower, except by a voluntary act of her own. Partition at law, where she is not a party and in which she does not join, will not bar a wife's right to dower. Where dower cannot be assigned by metes and bounds, it may be held to attach to rents, profits or other produce—and any equitable mode of compensation can be adopted; and the amount is to be regulated by the value at the time of the husband's alienation. The statute of limitations does not bar arrears of dower.

Bill by Elizabeth Van Gelder, for her dower, as the widow of Abraham Van Gelder, out of one fourth part of lots and buildings situated in William Street in the city of New York.

February 9,  
1836.

The points in the case were, upon the sufficiency of the evidence of marriage and the effect of a partition.

Dower.  
Marriage.  
Partition.  
Evidence.  
Statute of  
Limitations.

Mr. A. M. Griffin and J. Radcliff, for the complainant.

Mr. J. P. Hall, for the defendants.

THE VICE-CHANCELLOR:—In order to make out a *prima facie* right to dower, three things are necessary to be proved: marriage, seizin and the death of a husband.

No question is made in the present case as to the two last. Abraham Van Gelder, whom the complainant alleges to have been her husband, was seized of an undivided fourth part of the premises in which she claims her dower; and his death, during the year one thousand eight hundred and twenty-two, is clearly proved.

But it is said, there is not sufficient evidence of marriage: the testimony not showing an actual solemnization of mar-

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v.

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riage between the parties. I find it no where laid down to be necessary that such proof should be adduced, in order to establish a right of dower. Upon a plea of *ne unques accouple* and in all cases where the fact of marriage is in question, except in an action for criminal conversation or upon an indictment for bigamy, evidence of cohabitation, general repute, acknowledgment of the parties, reception into the family and other circumstances from which a marriage may be inferred, will be sufficient: Starkie's Ev. part 4, 939; *Fenton v. Reed*, 4 J. R. 52; *Jackson, ex dem. Van Buskirk v. Claw*, 18 lb. 346. In the present suit, there is abundant evidence of the latter description. I consider the marriage sufficiently proved.

Then, it is insisted that if the complainant was the wife of Abraham Van Gelder in the year one thousand eight hundred and six, her claim to dower is barred by the sale and conveyance under the proceedings in partition, in the court of Common Pleas, which then took place between her husband and his co-tenants in common. The record of this proceeding is in evidence. It was a suit for partition in the usual form, under the "act for the partition of lands," passed April 7, 1801, which resulted in a sale by commissioners, upon their report that the premises could not be divided. The commissioners made the sale and executed a deed to the purchaser under the direction of the court—and the defendant derives title from this source. The complainant was not named in or made a party with her husband to this proceeding, nor has she ever executed any release of her dower in conjunction with him or otherwise.

It appears to me impossible that such a proceeding can bar her dower, any more than a simple alienation by the husband would have done. It is true that the statute declares the sale and conveyance by the commissioners to be a bar against the owners and all persons claiming by, from or under them or any or either of them: 1 Kent & Radcliff's ed. Laws, 542: yet it could not have been intended to affect a wife's right to dower—who, according to my understanding of the law as it exists and always has existed in this state, cannot be deprived of this right, except by a voluntary act of her own.

Her right to dower being then established, the next question is, how and in what manner is she to receive it?

The dower consists in the use of one third of an undivided fourth part of the premises of which her husband was seized in common with others. This is equal to one twelfth of the whole, which is composed of three small lots as held in the year one thousand eight hundred and six (the time of the alienation) containing together about fifty-three feet fronting on William Street and about sixty feet in length. It was judicially ascertained at that time, that the property could not be divided into parts requisite for the partition, without great prejudice to the owners; and therefore, a sale was ordered. It is manifest now that to assign or admeasure to the complainant an equal twelfth part by metes and bounds would be giving to her what would be useless for occupancy or renting. The bill prays an assignment of her dower specifically or an equivalent in money.

Where, from the nature of the property, dower cannot be assigned by metes and bounds of the land, it may be held to attach to the rents and profits or other produce (as in the working of mines,) and any equitable mode of compensating the widow can be adopted: *Coates v. Cheever*, 1 Cow. 463; *Hale v. James*, 6 J. C. R. 258. But the amount of her compensation must be regulated by the value of the lands at the time of the alienation by the husband. This is now the fixed and settled rule in cases where the husband aliened in his life-time: *Walker v. Schuyler*, 10 Wend. 480.

In the present case, the sale under the partition act in the year one thousand eight hundred and six was a sale or alienation by the complainant's husband; and, at that time, the value of the whole property, according to the sale, which was at auction and doubtless effected for the most that could be obtained for the premises and therefore to be taken as evidence of the value, was eight thousand and eight hundred dollars. The husband's one fourth of this sum amounted to two thousand and two hundred dollars; and one third of that amount being put at interest at six per cent., allowing one per cent. from lawful interest to be deducted, as was done in *Hale v. James*, supra, and, for the reasons there assigned, would produce an annuity or yearly income of

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VAN GELDER  
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forty-four dollars. This may be taken as the criterion of the value of her dower; and this she is entitled to; and the same must be computed from the month of April, one thousand eight hundred and twenty-two, at which time her husband died.

The statute of limitations does not interfere with her claim to the arrears for the whole period which has elapsed: *Hazen v. Thurber*, 4 J. C. R. 604; *Ward v. Kilts*, 12 Wend. 137.

I shall, therefore, decree—considering the defendants as assenting to this course in preference to any other mode of liquidating the value of the dower: *Russell v. Austin*, 1 Paige's C. R. 196—the payment of the arrears by the defendants and an annuity of forty-four dollars during the life of the complainant, in full of her dower, to be a charge upon the premises: unless the defendants desire to secure the payment of that sum to her annually during life in some other way and such as a master shall approve. And considering the circumstances of this case, and the grounds upon which costs have been given and refused: *Hale v. James*, supra; *Russell v. Austin*, supra; I am of opinion the complainant is likewise entitled to her costs of this suit.

1836.

WYCKOFF

v.

SNIFFEN.

WYCKOFF and others v. SNIFFEN and others.

A defendant setting up in his answer that he is a *bona fide* purchaser without notice, must answer all allegations which tend to show his deed to be only colorable and fraudulent.

The complainants had filed a judgment-creditors bill *February 22* against their debtor John Boyd; and made John Sniffen a *1836.* party, charging the latter with holding real estate belonging *Pleading.* to the former and adding allegations going to impeach *Exception* Sniffen's title. *for insufficiency.*

The defendant Sniffen, by an answer, set up his being a *bona fide* purchaser, without notice: but he did not answer as to any thing in the bill which went to impeach his title. Forty-eight exceptions were taken to the answer. The master allowed the whole of them; and a general exception was taken by him to the report of the master.

Mr. *Mulock*, for the defendants and in support of the exception.

Mr. *Clarkson*, for the complainants.

THE VICE-CHANCELLOR:—Allowing the case of a *bona fide* purchaser without notice to form an exception to the *29 February.* general rule that a defendant who undertakes to answer must answer fully: *Cuyler v. Bogert*, 3 Paige's C. R. 186, yet it is very clear he must answer as to all the circumstances alleged in the bill to defeat his title in addition to the fact of his being a purchaser for a valuable consideration, without notice. Here, the defendant John Sniffen has not so answered. The bill contains a number of allegations of facts and circum-

1836.  
  
**WYCKOFF**  
 v.  
**SNIPPEN.**

stances to show that his deed is merely colorable and fraudulent as to creditors and of all these it seeks a discovery from him. This discovery he is bound to make. He cannot excuse himself any more than he could do if he had set up the facts by way of plea instead of answer.

The exceptions taken to the answer go to this point—as well as to matters of minor importance, which, perhaps, he might be excused from answering. The master has, however, allowed the whole of the exceptions, forty-eight in number. One general exception is taken to his report; but as the report is at least correct in part, a single exception to it on the ground of its being altogether wrong, cannot be allowed.

Exception to the master's report overruled, with costs.

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**JACKSON v. EDWARDS and others.**

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Where a bill is amended after appearance, it is necessary to enter a fresh order that the party answer the bill as amended and notice is to be given of the same with a copy of the amended bill. It cannot in such a case, be taken *p. c.* upon an order to answer entered prior to the amendment.

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March 8th.  
 1836.

  
**Practice.**  
**Amendment.**  
**Bill.**  
**Order to answer.**

Appearances had been entered; copies of bills served and orders to answer entered; then, amendments, prior to answers coming in, were made, and copies served: but no new order to answer was entered and the bill was taken as confessed upon the original orders to answer.

THE VICE-CHANCELLOR said, that the taking the bill *pro confesso* upon the original order was irregular. Where a bill is amended before answer and after appearance, it is necessary to enter a new order to answer the bill as amended, and the complainant, in such a case, cannot take advantage of the original order. The practice is properly laid down by Mr. Hoffman in his *Practice*, v. 1, p. 297.

*Note.*—There were peculiarities in the present case which caused the court not to give costs.

1836.

BOTTS

v.

COZINE.

BOTTS v. COZINE.

Where a party is complainant in equity and defendant (upon the same matter) at law, he cannot be compelled to make his election—it is not as if he were plaintiff in both courts.

In the month of January one thousand eight hundred and thirty-four, the defendant, John Cozine, brought an action of ejectment against Joseph Burtis, a tenant of the complainant, Alexander L. Botts, to recover certain premises in Queens County; issue was joined, but a verdict by default was had; judgment docketed for Cozine; and possession given under a writ of possession.

April 4th.  
1836.

*Election.*

The present complainant, Alexander L. Botts, filed his bill in this cause against the defendant, John Cozine, in the month of June last. He claimed therein a right to the lands embraced by the ejectment; set forth the circumstances connected with the action and suggested surprise; averred that he could not have adequate relief by a new trial or otherwise at law; and prayed that the defendant should release the premises and also be restrained from taking further measures upon his verdict.

A motion was now made, to require the complainant to elect whether he would proceed at law in the action of ejectment and now pending or in the suit in this court.

Mr. J. A. Lott, for the complainant.

Mr. Fessenden, for the defendant.

THE VICE-CHANCELLOR:—A court of law can grant a new trial in ejectment, where a judgment has been rendered by default, provided such court is convinced that justice will



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**SHETZLER**  
 v.  
**SHETZLER.**

be promoted and the rights of parties more satisfactorily ascertained and established, and this can be done at any time within five years after the docketing of the judgment: 2 R. S. 309, § 38. And in ordinary cases of ejectment, a court of law will allow of two new trials: *Ib.* § 37. Thus, a legal tribunal has power to do complete justice in actions of ejectment. But the present motion is not made upon the merits. It goes upon a point of practice in relation to election of remedies; and to this it has been objected that this court will not put a party to his election where he is complainant in the one case and defendant in the other—that he shall not be compelled to stand upon his defence at law or upon his complaint in chancery—that he must be plaintiff at law and complainant in equity in order to let the rule of election apply. That this is the right doctrine seems perfectly clear; and the present motion must be refused, with costs.


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**SHETZLER v. SHETZLER.**

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In divorce cases, it must always clearly appear that service of subpoena has been made within the jurisdiction.

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1836.  
  
*Practice.*  
*Service* of  
*subpœna.*  
*Divorce.*

His Honor, THE VICE-CHANCELLOR, wished it to be understood that he should require the fact to be clearly and distinctly shown, upon the motion for a reference in all divorce cases, upon bill taken as confessed, that the subpoena to appear and answer was served at some place within the jurisdiction of the court—the case of *Dunn v. Dunn*, 4 Paige's C. R. 425, warranting this regulation—and a case lately before him having progressed very far to a decree when it was found out that service of subpoena had been effected by the husband himself upon the wife in the city of New Orleans. He also said that he should require the

production of the original affidavit of service of subpoena or of a certified copy, in order to see that it was sufficiently positive as to the identity of the party on whom the service was made, as in one instance which had come to his knowledge, the wife had been personated for the purpose of such a service, and a decree obtained against her entirely by surprise.

1836.  
IN THE  
MATTER OF  
WINDLE.

In the Matter of WINDLE.

Form of proceedings upon the application of a father that the legal title of land might be conveyed from his infant children to him, he having purchased while an alien and had the property conveyed into his wife's name and she having died while the property was vested in her, leaving these infant children.

A guardian *ad litem*, executing a deed for an infant, should sign thus: "G. B. W." (the infant) "by J. W. his guardian *ad litem*."

William B. Windle had purchased lots of land in the city of New-York while he was an alien; but, by the advice of counsel, the property was conveyed to his wife. She afterwards died and left infant children.

April 27,  
1836.  
Alienage.  
Infant.

Mr. Charles Edwards now presented a petition from William B. Windle, setting forth the circumstances in detail, as follows:

In Chancery, before  
the Vice-Chancellor. }

To the Chancellor of the State  
of New-York.

The Petition of William  
B. Windle, of the city of  
New-York, Merchant,  
Sheweth, }

That in or about the month of February, in the year one thousand eight hundred and twenty-five, your Petitioner, having monies of his own, arising

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from his own earnings. agreed to purchase and did purchase from C. D., the fee simple of *all those* three certain lots of ground situate &c. &c. And your Petitioner further shews that he purchased the same, subject to the unexpired term of a certain lease, theretofore executed by the said C. D. to A. R. S. bearing date the first day of May one thousand eight hundred and twenty for the term of seven years; and the same lease was given up to your Petitioner, as the purchaser, by the said C. D. and has remained in your Petitioner's possession ever since. That William Slosson, Esquire, was, at that time, the professional adviser of the said C. D. and your petitioner also left it with the said William Slosson to make out the title for your Petitioner and do all that was needful so as to have the said ground and premises vested in your Petitioner: But your Petitioner shews that at that time, yet after your Petitioner had purchased the property, it occurred to the mind of the said Mr. Slosson that your Petitioner might not have obtained his citizenship—and having ascertained that such really was the case, the said Mr. Slosson advised your Petitioner to have the said ground and premises conveyed from the said C. D. to your Petitioner's then wife, Sarah Martha Windle, a native born American. That your Petitioner was guided by such advice; and the same ground and premises were conveyed in fee by the said C. D. and S. his wife to your Petitioner's said wife, Sarah Martha Windle, by deed bearing date the nineteenth day of February one thousand eight hundred and twenty-five and which was recorded in the office of the Register of the city and county of New-York in Liber 187 of Conveyances, page 456; and which deed is and always has been in your Petitioner's possession. And your Petitioner further shews, that it was a part condition of the said purchase that a mortgage should be given for part of the consideration money, namely, for the sum of one thousand nine hundred and fifty dollars and interest; that such bond was made out in your Petitioner's own name alone and executed by him and afterwards fully satisfied out of your Petitioner's own private funds; and also a mortgage of the premises was likewise made out in the name of your Petitioner and his said wife—and which said bond and mortgage are in your

Petitioner's possession. And your Petitioner further shews that the consideration moneys for the said deed and premises, namely, two thousand eight hundred dollars, were the proper and private monies of your Petitioner; and your Petitioner's said wife, Sarah Martha Windle, in no way contributed to such purchase, nor did any of her money, estate or effects go towards such consideration. And your Petitioner further shews that he has also, out of his own private funds and earnings, expended in buildings upon the said ground and premises, at least the sum of ten thousand dollars; and has, uncontrolled, at all times, since the said period of purchasing, let the said premises and received the rents as his own and applied the same to his own business and purposes. And your Petitioner further shews, that after such purchase, and on the twenty-third day of February, one thousand eight hundred and twenty-seven, your Petitioner became a citizen of the United States of America; and now holds considerable real estate in his own name and he is a resident Merchant of the city of New-York: but your Petitioner neglected from time to time to have such ground and premises hereinbefore described passed from your Petitioner's said wife to your Petitioner; and it has so happened that your Petitioner's said wife, Sarah Martha Windle, is now dead, also the said William Slosson, Esquire, is dead—as well as the commissioner who took the acknowledgment of the said deed, namely, Robert L. Wilson, Esquire—But for all this your Petitioner hopes to be enabled to prove sufficient, under the circumstances, to satisfy this Honorable court that your Petitioner ought to have the legal estate in the ground and premises aforesaid vested in him and which he is anxious to have done, in order that he may have the uncontrolled possession and legal and equitable fee of and in the said ground and premises. And your Petitioner further shews, that the said Sarah Martha Windle had the following living children by your Petitioner, namely, G. B. W. aged sixteen years, J. B. W. aged fourteen years, and E. B. W. aged eleven years.

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Your Petitioner therefore prays that it may be referred to one of the masters of this court, residing in the city of New York, to take testimony, not only as to material facts directly mentioned in the said petition or such of them as are in the power of your Petitioner to prove, but also of corroborating circumstances which would go to show that the said ground and premises were purchased with your Petitioner's own funds and that your Petitioner ought to have the legal and equitable fee of the same vested in him; and, if agreeable to the rules and practice of this court, that your Petitioner be examined, touching the said premises, before the said master; and that a special guardian *ad litem* be appointed for the said infants, who shall appear on the said reference and watch their rights and interests, if any they have. And so that, upon the coming in of the said Master's report, provided such report be in favor of your Petitioner and of his petition, that an order or decree be entered declaring that your Petitioner shall have the legal and equitable fee in the said ground and premises without further consideration; and that your Petitioner's said infant children, G. B. W., J. B. W. and E. B. W. be declared trustees for your Petitioner in the premises and be directed to convey the said ground and premises to your Petitioner, under the hand and approval of the said master—or for such other or further order as this court, under the circumstances, may see fit to grant and as may be agreeable to equity. And &c.

Thereupon, the following order was entered:

(Title) "On reading the petition of the above Petitioner, William B. Windle, duly verified; and on motion of Mr. C. E. of counsel for the said Petitioner: it is ordered that the said petition be referred to Frederic De Peyster, Esquire, one of the Masters of this court, to take testimony as to the alleged purchase by the Petitioner, William B. Windle, of C. D., in or about the month of February one thousand eight hundred and twenty-five, with his own monies and on his

own account, of all those three certain lots of ground &c. &c. And it is further ordered that the said Master, under such reference, take testimony, not only as to material facts directly mentioned in the said petition or such of them as are in the power of the said petitioner to prove, but also of corroborating circumstances which would go to show that the said lots of ground and premises were purchased with the said Petitioner's own funds and that the said Petitioner ought to have the legal title and estate of the same vested in him. Also, that upon such reference, the said Petitioner be examined touching the said premises. And it is further ordered that J. W. Esquire, one of the solicitors of this court, be and he hereby is appointed special guardian *ad litem* for G. B. W., J. B. W. and E. B. W., infant children of the said William B. Windle, to appear for them on the said reference and to guard the rights and interests of the said children; and that the said master have power to summon before him the friends and relations of the said infants and to examine them or any other persons as witnesses in opposition to the claims of the said Petitioner. And it is also ordered that the said master report in the premises with all convenient speed. And that all further proceedings upon the said petition be stayed until the coming in of the said master's report."

The master reported in favor of the application; and, on motion, the following final order was entered:

(Title.) "Whereas by an order heretofore made upon this petition on the thirteenth day of April instant, whereby it was ordered that the petition above mentioned should be referred to Frederick De Peyster, Esquire, one of the Masters of this court residing in the city of New York, to take testimony and report as to the alleged purchase by the said petitioner, W. B. W. of C. D. in or about the month of February one thousand eight hundred and thirty-five, with his own monies and on his own account, of all those three certain lots of ground &c. &c. And whereby it was further ordered that the said Master, under such reference, take testimony not only as to material facts directly mentioned in the said petition or such of them as were in the power of the said Petitioner to prove, but also of corroborating circumstances which would go to show that the said lots of ground and

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premises were purchased with the said petitioner's own funds and that the said petitioner ought to have the legal title and estate of the same vested in him and also that upon such reference the said Petitioner be examined touching the said premises. And whereby it was also ordered that J. W., Esquire, one of the Solicitors of this court, be and he thereby was appointed special guardian *ad litem* for G. B. W., J. B. W. and E. B. W., infant children of the said William B. Windle, to appear for them on the said reference and to guard the rights and interests of the said children; and that the said master have power to summon before him the friends and relations of the said infants and to examine them or any other persons as witnesses in opposition to the claims of the said Petitioner. And whereas the said Frederick De Peyster, Esquire, as such master, in and by his report in the premises, bearing date the twenty-third day of April, one thousand eight hundred and thirty-six, (after reciting the said order) reported, amongst other things, that the said guardian *ad litem* for the said infant children admitted on the reference had before the said master that G. B. W. the eldest son of the said petitioner was fully competent, in his opinion, to understand his rights, if he had any, in this matter, being an active and intelligent lad in the partial superintendence of his father's business, that he disclaimed to have any rights derived from the mere circumstance of the deed being taken in the name of his mother, as he felt satisfied that the purchase had been made from the funds of the father and that the mother never had any property of any considerable value but what she had derived from him—also that the said infant G. B. W. had subsequently appeared before the said master and made a declaration similar to that made by his said guardian; and also that, from the testimony taken and examination made before him (and fully referred to in the said report) he was of opinion that the said purchase of the said lots of ground and premises was made by the said William B. Windle, the Petitioner, on his own account and from his own peculiar funds; also that the deed taken on the purchase from the said C. D., and wife was taken in the name of the deceased wife of the said petitioner and not in his own name because he was then an

alien; also that he was then, at the time of the said report, a citizen, as appeared from the certificate of his naturalization exhibited by the said petitioner to the said master; and also that the testimony so taken by him, the said master, substantially showed that the said lots of ground and premises were purchased with the said petitioner's own funds and that he ought to have the legal title and estate of the same vested in him. Now, upon motion of Mr. C. E. of counsel for the said petitioner and upon reading and filing the said master's report, and due deliberation having been had by the court in the premises; *it is ordered* that the said report be and the same is hereby confirmed. *And it is hereby declared, adjudged and decreed*, and the said court, by virtue of the power vested therein, doth declare, adjudge and decree that the said petitioner, W. B. W. is entitled to the legal as well as equitable estate in fee of and in the said three lots of ground and premises before described with the appurtenances and that the title thereto, which has descended to his infant children the said G. B. W. J. B. W., and E. B. W. from their mother be and the same is hereby considered to be in trust for the said petitioner W. B. W. *And it is further ordered, adjudged and decreed* that the said G. B. W., J. B. W. and E. B. W. execute a conveyance to the said petitioner in fee of the said lots of ground and premises herein before described, with all houses, erections and buildings standing and being thereon and appurtenances relating thereto, the form of which said conveyance shall be settled and approved by the said master, Frederick De Peyster, Esquire, and so that the said J. W. special guardian *ad litem* for such infants, execute such conveyance on their part and as their act and deed. And also that the said Petitioner bear the costs of his own solicitor and counsel and pay the costs of the said special guardian *ad litem* to be taxed."

A deed was subsequently made and executed pursuant to the above order. The guardian *ad litem* signed for the infants thus: "G. B. W., by J. W. his guardian *ad litem*"—and this, the court has said, is the proper way whenever a deed is made out in the name of an infant.

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IN THE  
MATTER OF  
WINDLE.



1836.

DAY  
v.  
WEST.

DAY, administrator of EDWARDS, deceased v. WEST and another.

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Although a divorce *a mensa et thoro* be had, yet the wife is entitled to dower out of the husband's lands if she survives him.

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April 27,  
1836.

Husband  
and wife.  
Alimony.  
Dower.

The bill was filed to foreclose a mortgage given by the defendant Jesse West to John Edwards, deceased. West objected to payment, on the ground of the defendant Bridget Edwards, the widow of the said John Edwards, having an estate of dower in the mortgaged premises; and that his title to the property for which he had Edwards's warrant deed, was thereby impaired. The complainant alleged that a divorce had taken place between John Edwards and Bridget his wife and alimony paid her in gross by way of bar to the supposed right of dower.

It appeared that the defendant, Jesse West, before the execution of the mortgage, objected to the taking of the title, on the ground of the supposed claim of dower initiate; that Edwards denied altogether such right and exhibited the decree for a divorce to West; and, in order finally to induce him to complete the purchase, he allowed a special condition to be inserted in the bond and mortgage, to the effect that West should pay six per cent. interest on the mortgage during the coverture of Edwards and wife and that the principal sum should only become payable upon the death of the said Bridget or the extinguishment of her right of dower. The complainant contended, she had no right of dower in the premises; and that West ought to pay off the mortgage.

The answer of the defendant, Jesse West, admitted many of the material allegations of the bill; but contended that the widow was entitled to dower and he was not bound to pay until her death or a release of dower was had.

The case came before the court upon bill and answers. The pleadings will be found sufficiently referred to in the opinion of the court.

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DAY  
v.  
WEST.

Mr. *James Smith*, for the complainant.

Mr. *P. A. Cowdrey*, for the defendant *Jesse West*.

Mr. *W. H. Elting*, for the defendant *Bridget Edwards*.

**THE VICE-CHANCELLOR** :—According to the condition of the bond and mortgage, the defendant, *Jesse West*, was to pay the interest of six per cent. on two thousand dollars during the joint lives of the intestate *John Edwards* and his wife *Bridget*: and upon the death of the wife or the extinguishment of her right of dower, the principal sum was to be paid. At the death of the intestate, it appears, less than one hundred dollars was in arrear for interest, so that his personal representative, who has filed this bill, could not sustain it on the ground of such arrears being due—the sum being below the jurisdiction of this court.

The first question then is: whether any thing more was due or could be demanded when the bill was filed? I think it is very evident, from the recitals and the condition in the bond, that both the parties to the instrument understood or, at least, supposed that the wife of the obligee had an inchoate right of dower, which could only be extinguished by her death or by some future valid act of release or election on her part. Hence it was that, by way of indemnity to the obligor against such claim or right of dower, the interest on the debt secured by the bond and mortgage was to cease the moment such right became perfect by the death of the husband—and the principal sum was not to be demanded or be considered payable until either the death of the wife or some voluntary act of hers should put an end to her dower. The condition upon which the principal sum was to become payable, according to the terms and obvious meaning of the bond and mortgage, seem to admit that the wife would certainly be entitled to dower in the event of her surviving her husband; and it would be contrary to this.

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v.

WEST.

implied admission to hold that the principal sum or any further interest has become due and payable.

But it is contended, on the part of the complainant, that his intestate, the husband, was mistaken on the subject of his wife's right to dower, after what had passed between them; that she was equitably barred of all such claim and right; and, as all that the defendant, West, can reasonably ask is to be indemnified and protected, it is now competent for this court so to decree against the wife who, for that purpose is made a party to the suit; and to require the mortgagor either to pay the money or suffer the property to be sold.

This brings us then to the question, whether the wife is barred in equity; for it is conceded that nothing has occurred to work a legal forfeiture or extinguishment of her right?

The grounds assumed for the purpose of producing this effect in equity are, that by the articles of separation in the first instance between the husband and wife, which are stated in the pleadings, she agreed to accept an annuity of two hundred and fifty dollars for life, in full satisfaction for her support and maintenance and of all right and claim of dower in her husband's estate; and that subsequently, by a decree of the Court of Chancery, upon a bill filed by her against her husband for a divorce *a mensa et thoro*, she accepted a gross sum of eleven hundred dollars "in lieu of alimony and of all claims or charges whatever upon her husband for her separate support and maintenance for ever."

The articles of separation referred to could only operate in equity, not at law, to deprive or bar her dower; and in equity, under the circumstances disclosed by the answer of Mrs. Edwards, the articles cannot be permitted to have this effect. She shows they were violated by her husband's refusal or neglect to pay the annuity and to afford her the maintenance which was to be in satisfaction of her claims upon him and his estate. His refusal drove her to the necessity of filing her bill for a judicial separation and alimony; and a decree having been made, it is upon the effect of this decree solely that the question depends whether she is barred of dower?

There is nothing in the decree directly showing that the

sum in gross allowed to her was intended to cover and operate as a satisfaction or in lieu of dower: it is expressed to be in lieu of alimony. It was offered to be paid by the husband as such, and upon this offer, a reference was ordered to a master to ascertain whether it would be for her interest to accept it; and the master reported it would be. It is true, he appears to have ascertained the extent in value of the husband's property and the age of the wife: but it does not appear he made any calculation based upon the probable duration of her life with reference to dower, for, after all, he only says that eleven hundred dollars is a fair and liberal allowance to be paid in lieu of alimony; and the proceedings show the sum was offered as a compensation for alimony and nothing more. What, then, is the effect of an allowance of alimony or of a sum in gross in lieu of it, in a suit for a divorce of this kind? By the decrees, the parties are merely separated either for a limited period or for their joint lives; and while thus living apart, the wife is entitled to a support from her husband or out of his property. The amount is fixed and awarded by the court; and the payment of it is to continue only for so long a time as the decree is operative that is, while the parties remain separated by virtue of the decree. It is only so far permanent. In case of the wife's death, leaving the husband surviving, the payment ceases of course; and so, in the event of his death, the wife surviving, there is an end of the decree. The separation, by virtue of the decree, is superceded by the separation occasioned by the death of the husband; and as the relation of husband and wife has all along subsisted, the marriage not having been dissolved, the wife then stands entitled to all the rights of a widow which the law would give her, both in respect to the real and personal estate of her deceased husband.

I am convinced this is the correct view to be taken of the case. In England, where both for cruelty and adultery the divorce is only *a mensa et thoro* and where the wife, when she is the injured party, is allowed permanent alimony, as it is called, I cannot find that it has ever been suggested, in any reported case or by any elementary writer, that the effect of such an allowance is to deprive the wife of any of

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DAY  
v.  
WEST.

1836.

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v.

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her legal rights at the death of her husband; and no good reason can be assigned why the law should be so, when the object of alimony is rightly considered. It is true, a wife may debar herself of dower or of any other claims which she may have upon her husband's estate after his death, by accepting a jointure or other provision in marriage articles or by will: See *Slatter v. Slatter*, 1 Younge & Collyer, 28; but what she thus accepts must clearly appear to be given as a substitute for dower. This collateral satisfaction depends upon her own election; and when that election is once made—and this court will, in many cases, compel her to elect—it will operate as an equitable bar, although it may not constitute strictly a legal one: *Stalman on Elect.* 247.

I know of no way by which a feme covert can be barred of her dower, except by her uniting with her husband in a deed for the purpose, duly acknowledged according to statute, or by convicting her of adultery, which works a forfeiture, or upon the doctrine of election, by her accepting a jointure or some other provision in lieu of dower. None of these have occurred in the present case.

It may be asked, what becomes of the wife's right of dower where she proceeds against her husband and obtains a divorce *a vinculo matrimonii*? The answer is obvious. In such a case, all right to dower is gone: not, however, because she has obtained an allowance of permanent alimony or any thing in lieu of alimony, if either should be decreed, but because of the dissolution of the marriage which puts an end to the relation of husband and wife; and, by necessary consequence, to the right of dower—since it is essential to dower that the marriage should subsist at the death of the husband. A woman cannot have dower who is not the wife of a man in whose lands she claims it at the time of his death.

As the defendant, Mrs. Edwards, was the lawful wife of the complainant's testator at the time of his death, though living in a state of separation by the decree of this court, she was clearly entitled to dower; and I am of opinion nothing has been done to extinguish or deprive her of it. The

complainant, therefore, cannot enforce the payment of the bond and mortgage during her life or the existence of this right; and his bill must be dismissed, with costs to be paid out of the estate in his hands.

1836.  
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IN THE  
MATTER OF  
EVERIT.

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In the matter of EVERIT, administrator of Everit.

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Where a person leaves a contract for the sale of lands unperformed at the time of his death and application is made, under the statute, for his infant children to perform it, the purchase money will go as assets and not follow the course of real estate. The order upon the coming in of the master's report, in a case like the above, is as a final decree and must be enrolled like other decrees.

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A petition had been presented on behalf of the administrator of Thomas Everit, junior, setting forth that the latter made contracts for the sale of lands at Brooklyn, received deposit monies and died without leaving a will or performing these contracts. His widow and infant children survived him. Performance was prayed pursuant to the statute; 2 R. S. 194, § 169.

May 2nd.  
1836.  
~  
Specific performance.  
Infant Trustees.  
Assets.

This petition was referred to a master; and he based his report and the calculation attached to it, by way of schedule, upon the idea that the purchase moneys would be due to the children as heirs and to their mother as dower tenant.

Mr. W. C. Wetmore, for the petitioner.

THE VICE-CHANCELLOR considered that the character of the consideration was changed, by the contracts for sale made by the deceased, and it became personalty and assets which the administrator ought to take; and that none of it could be paid into court for the infant heirs.

His honor also looked upon the final order as a decree and decided that the deeds, which the infants were to give by their guardian *ad litem*, could not be executed until the

1836.  
  
 IN THE  
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 EVERIT.

decretal order was enrolled, i. e. not till thirty days after it had been entered in the minutes of the court; 2 R. S. 181, § 91, (and amendment thereto by the act of 20th April, 1830.)

The following would be the form of the final order in a case like the above :

(*After fully reciting the petition and master's report*;) "on motion of Mr. C. M. Esquire, on behalf of the petitioner; and hearing Mr. C. E. guardian for the infants, and due deliberation having been thereupon had, his honor the Vice-Chancellor, by virtue of the power and authority of this court, doth *order, adjudge and decree* a specific performance of the several contracts and agreements mentioned in the said petition; also that on the receipt of the balance of the purchase money from the said purchasers respectively by the petitioner as such administrator, the said infants, by their said guardian *ad litem*, execute to the said purchasers respectively good and sufficient deeds in fee simple for the premises so contracted to be sold to them respectively (the said deeds to be first approved by the Vice-Chancellor of the first circuit;) that out of the said balance of the purchase moneys the said petitioner, in the first place, pay off, satisfy and discharge and cause to be cancelled of record the said mortgage to the said K. L., now upon the premises; that in the second place he pay to his solicitor and to the said guardian *ad litem* their costs in this matter to be taxed, and that he retain the remainder of the money to be by the said administrator applied in the due course of administration. And also that the said widow release her right of dower in the premises."

The following is the certificate of approval which the Vice-Chancellor, in the above case, endorsed upon the deeds to the purchasers, after they had been executed in the name of the infants by their guardian *ad litem* :

"I have perused the within deed and do hereby approve of the form thereof and of the manner of its execution; and allow it to be delivered as a good and effectual conveyance of the within premises. Dated the——day of——1836."

"Wm. T. Mc Coun, V. C."

1836.

LA ROQUE  
v.  
DAVIS.

LA ROQUE, *et al.* v. DAVIS.

Upon deciding whether a complainant may be allowed to file a replication after the ordinary time is passed, the court will not look into the pleadings to see what equity the complainant has. It will grant it or not upon the merits of the application merely.

The complainant's counsel applied for leave to file a replication, notwithstanding the cause had been noticed upon bill and answer by the defendant. It appeared, as an excuse for not filing it before, that the solicitor for the complainant had been unwell.

July 9.  
1836.

*Practice.*  
*Leave to file*  
*replication*  
*after cause*  
*noticed.*

An objection was raised, not on account of *laches*, but because there really were no merits in the bill and likewise that it was a case of hardship on the part of a family who were distressed from the fact of an injunction having been issued.

THE VICE-CHANCELLOR, however, considered he could not look into the merits of the cause on a motion of this kind, nor take notice of the suggested distress of any parties. This was a case, he said, where creditors were seeking for satisfaction of their just demands and if they were entitled to the property which had been enjoined all considerations of hardship upon the defendants must be laid aside.

The complainants had leave to file a replication within ten days, upon paying the defendant's costs of putting the cause upon the calendar and of opposing this motion. But, inasmuch as the defendants suggested they might find it necessary to file a supplemental answer, the court gave them the liberty of doing so within six days and, in that event, each party to bear his own costs.



1836.

VAN RANST  
v.  
PARCELLS.



VAN RANST v. PARCELLS.

Vendor decreed to perform contract, with costs. All the purchase money had not been paid. Court allowed the vendee to off set the costs against the balance in hand.

July 9th.  
1836.

Vendor and  
Purchaser.  
Set-off.  
Costs.

Bill for a specific performance. The cause had been heard and a decree passed for specific performance and that the complainant (the vendee) pay the balance of the consideration money. The defendant was ordered to pay the costs of the suit.

A reference was had to ascertain the amount of balance of the purchase money unpaid; and the master had reported it at eighty-two dollars and fourteen cents.

The only question now made, on the equity reserved, was whether the vendee could offset the costs awarded to him against this balance—the vendor refusing to execute a conveyance under the decree until the whole of the sum of eighty-two dollars and fourteen cents was actually paid to her.

Mr. S. F. Clarkson, for the complainant.

Mr. R. L. Schieffelin, for the defendant.

THE VICE-CHANCELLOR:—Let a further decree be had requiring the defendant to deliver to the complainant a deed of the premises properly executed and acknowledged; and that the defendant also pay to the complainant her costs of this suit to be taxed. And the complainant is to be at liberty to retain the sum of eighty-two dollars and fourteen cents reported to be due from her to the defendant as a balance of the purchase money—which is to go towards the costs, payable by the defendant to the complainant, by way of off-set. If any balance should remain after this is done, then it is to be paid forthwith to the defendant or her solicitor; but if the eighty-two dollars and fourteen cents should prove insufficient to pay the costs of the complainants, she is to have execution for the residue according to the course and practice of the court.

VICE-CHANCELLOR'S COURT.

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1835.

FARMER  
v.  
WALTER.

FARMER v. WALTER.

If a party is arrested by due process of law for a demand claimed to be due and chooses to compromise, by giving his note or bond for the purpose of obtaining his liberty, although, for the want of bail he may be unable to obtain it in any other way, yet such compromise will not be, therefore, set aside nor the security decreed to be delivered up. There must be fraud or illegality in the proceeding or in obtaining the security.

The bill showed that the complainant, Richard H. Farmer, late of the island of Antigua, being on a visit with his family at Philadelphia, was unexpectedly arrested at the suit of the defendant, Jacob D. Walter and others, executors of John J. Walter deceased, and at the immediate instigation of the said Jacob D. Walter formerly of Antigua but at New York at the time the bill was filed and in Philadelphia when the arrest took place. That he, the complainant, was so held to bail in the sum of twenty thousand dollars, and being a stranger and without friends, he was thrown into the debtor's prison; that the action was commenced without demand or intimation; that the claim against him arose out of a lease of an estate in Antigua, of which he was a lessee; that, with a single exception and that in a very trifling amount, he was never before sued and never before imprisoned and his incarceration was the source of the most agonizing affliction to his family and mortification and pain to himself—so much so that almost any terms for his release would have been complied with. That on the day next after his said arrest, the said defendant, Walter, proposed to the complainant, as the only terms upon which he was willing to grant him a discharge, to receive the complainant's promissory note for three thousand pounds Antigua currency or six thousand six hundred and sixty-six dollars and sixty-six cents United States currency; and finding himself without friends or any other

October 13,  
1835.

*Jurisdiction.  
Security given under  
duress.  
Debtor and creditor.*


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means of release and more especially to relieve his wife from an almost distracted state of mind into which she had been thrown, he finally consented to give and did give the proposed note, payable on demand, to the order of the said Walter; and that such note was still in his (Walter's) possession or under his control. That at the time of giving the note, he explicitly told the defendant he did not thereby admit any indebtedness. And the complainant averred the said note to be without consideration and that the same was extorted and fraudulently obtained; and that he had sustained damage and loss from the said Walter, on account of a forcible entry and possession of the premises contained in the said lease. That the defendant, when he left Antigua, brought letters directed to the defendant, but had concealed and retained the same; that the defendant had brought an action against the complainant in the island of Antigua, to settle the matters in controversy under the lease, which was still pending. Prayer that the said Jacob D. Walter might be decreed to give up the said promissory note to be cancelled; and for further relief. Also, for an injunction restraining him from parting with the said note and from instituting any proceeding at law thereon.

A general demurrer was interposed.

*M. F. B. Cutting*, in support of the demurrer.

*Mr. Van Wagenen*, for the complainant.

February 8, 1836.  
 THE VICE-CHANCELLOR:—This is a general demurrer, for want of equity, to the discovery and relief sought by the bill.

When a person is illegally imprisoned or restrained in his liberty and he enters into an obligation or gives a note to the party causing the restraint, the same is voidable at law for duress: *Thompson v. Lockwood*, 15 J. R. 259; and a court of equity will also relieve on the ground of fraud and extortion: *Dyer v. Tymewell*, 2 Vern. 122. So, if a man is arrested by due process of law and a wrong use is made of the arrest, such as requiring him to do an act foreign to the purpose for which he was arrested—or if, while

in custody, he is put under any unlawful deprivation or restraint, the original arrest will be construed to be unlawful; and this court, upon the ground of fraud and duress, will relieve the party from the consequences of the act: *Nicholls v. Nicholls*, 1 Atk. 409..

But it never can be that, if a party is arrested by due process of law for a debt or demand claimed to be due and he chooses to compromise, by giving his note or bond for the purpose of obtaining his liberty, although for the want of bail he may be unable to obtain it in any other way, that such compromise will be set aside and the bond or note be decreed to be delivered up. There must be something to denote fraud or illegality in the proceeding or in the mode of obtaining the security to authorize the court to interfere.

In the present case, there are no such circumstances. The complainant was arrested and imprisoned by due process of law, issuing out of a court of competent jurisdiction, which might have relieved him on bail or without bail or for any good cause shown to the court. Nor was there any tortious use made of the imprisonment to force him to give the note in question. The arrest being a lawful one and no improper use being made of it afterwards, there was no duress but such as the law tolerates: *Com. Dig. Pleader*, 2 W. 19.

The circumstances, as set forth in the bill, that the complainant was unexpectedly arrested—that he was a stranger and without friends in Philadelphia—was never before sued—that his imprisonment was a source of affliction to his family and mortification to himself—and that, to relieve his wife from an almost distracted state of mind, he was induced to accede to terms of compromise and to give the note: are not such as show a fraudulent design or intention by these means to extort from him what the defendant (the plaintiff in the suit at law) knew or believed he was not entitled to. Fraud cannot be implied from such circumstances. If there had been no previous indebtedness to serve as a consideration for the note, the complainant should have contested the matter at law and taken measures for his discharge, by an application to the proper authority. Once establish it as a rule of equity that, because a party is arrested and impri-

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soned and unable to give bail in a suit at law for a debt which is honestly claimed to be due from him, the plaintiff cannot lawfully compromise and take a valid security for the demand or any part of it, and the situation of imprisoned debtors will be rendered more durable and oppressive than ever—or, if a person, under such circumstances, after effecting his liberation, by a compromise and security, can immediately turn round and compel his creditor to give up the security, it is very plain that the whole object of compulsory process of courts of law will be defeated. There is some reason to believe, from the statements in this bill, that the giving of the note in question was a mere artifice to evade the process and obtain his liberation.

It is not alleged in the bill that the suit was wantonly or maliciously commenced and without cause of action. Although the complainant states his belief that, by charging the defendant with damages for a trespass, in forcibly taking possession of his leasehold estates in Antigua, the defendant would be indebted to him and although concealment of letters from complainant's agent in the West Indies is alleged, it does not appear that such concealment was continued until after the compromise was agreed upon and the note was given. The letters were delivered to him on the same day; and the inference is that the delivery was before the compromise, for every fact is to be taken most strongly against the party pleading it. Hence, it must be concluded the complainant knew before and at the time he gave the note, all that he has alleged and cannot be allowed to urge that the compromise was effected through ignorance of his rights or by fraud and concealment of facts, which, though insinuated, are not expressly charged.

My opinion is that the bill contains no sufficient ground for equitable interference; and that the demurrer is well taken.

Demurrer allowed, with costs.

VICE-CHANCELLOR'S COURT.

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v.  
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HAM.

FITZHUUGH v. EVERINGHAM, survivor, &c.

A party at law, who wants the production of books, accounts or letters to aid him, should (under the statute) apply to the court in which the action is brought. As such court can order the production of them, equity will not entertain a bill of discovery for the purpose.

This court will not uphold a bill of discovery, unless there is a clear necessity for it. If, besides the mere production and disclosure of written instruments, the bill seeks to elicit facts within the personal knowledge of the opposite party and which cannot otherwise be proved, this court will entertain such a bill.

Bill of discovery, in aid of an action at law; and to *January 13,*  
which demurrers were taken to distinct parts, but covering 1836.  
the whole of the discovery sought.

The object of the discovery (in aid of the action) was to *Bill of discovery.*  
countervail the defence, of which the defendant had given *Demurrer.*  
notice, with his plea, he meant to set up and prove on the *Jurisdiction.*  
trial in bar.

The action had been brought by the complainant, as endorsee of three several bills of exchange, against the defendant as acceptor. The bills had been drawn by one Warham, who afterwards died. The defence intended to be set up, according to the notice, was in substance that Warham made purchases of property as agent for and on account of the complainant, which came to the complainant's possession; and in payment for such purchases, drew the bills in question on the defendant, who accepted the same upon the promise or assurance of Warham, as such agent, that the complainant would furnish the defendant with the necessary funds or property to sell on commission and from which he could realize money to meet his acceptances. That the complainant, not having furnished the defendant with funds or means to pay the bills according to the promise of Warham, as agent of the complainant, and the defendant having received no value for the same, being merely an accommo-

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dation acceptor, suffered the bills to remain unpaid; whereupon the complainant was threatened, by the payees, with suits founded upon the original consideration for which the bills were drawn (being the principal and, as such, liable for the acts of his agent Warham) and then went forward and paid the bills, took them up and brought his suit at law against the defendant as acceptor.

The bill alleged that in the years one thousand eight hundred and thirty-one and one thousand eight hundred and thirty-two, the defendants were the agents and consignees of Warham in receiving from him property to sell on commission; and that he shipped and consigned to them large quantities of produce for sale—and also sent them money and drafts to be placed to his credit, and they were in the habit of making advances to him and of accepting his drafts. And at the time of Warham's death, the defendants were largely indebted to him. That there was still property or the proceeds of property belonging to Warham of a large amount in the defendant's hands; and when the bills of exchange in question became due and payable, the defendants were in funds belonging to Warham sufficient to have taken them up; and that the defendants ought to have done so. Also, that Warham, at the time of his death and when the action at law was commenced, was indebted to the complainants in a sum larger than the aggregate amount of the three bills of exchange upon which his suit was brought. The bill sought a discovery of the state of the accounts between the defendants and Warham; and alleged "that if such discovery is made, it will appear either that the bills were accepted by defendants as advances on merchandize for Warham or in payment of the proceeds of sales of produce for him or that the state of the accounts will show that the defendants were in funds of said Warham to take up their said three acceptances." It also prayed that the defendants might set forth and discover whether they received any letters of advice from Warham on his drawing the three bills of exchange; and if so, that they might annex to their answer full, true and correct copies thereof. There was, however, no charge or allegation in the bill of even the

complainant's belief that any such letters of advice were written.

Mr. T. Fessenden, in support of the demurrer.

Mr. J. W. Gerard, for the complainant.

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&  
EVERING-  
HAM.

May 31.

THE VICE-CHANCELLOR:—Where it would be proper in this court, upon a bill for the purpose of discovery, to compel a discovery of books, papers and documents in the adversary's possession, to aid in the prosecution or defence of a suit at law, it will be proper, in the Supreme Court, to compel the same thing in suits depending before that court. They now have the same power, by statute, which this court has been accustomed to exercise; and it can be exerted there in a more summary manner and with less expense to the parties: 2 R. S. 199, § 21, to 27. Here, the object of the bill is the production and discovery of books, accounts and letters of advice, alleged to be in the defendant's possession and material for the complainants to have, in order to overthrow a defence which the defendant means to set up on the trial at law. There is nothing else in the discovery sought material or necessary for the complainant to have, except the accounts and letters, if any—and these he might obtain in the suit at law upon a petition to the court in which it is commenced or to any one of the judges of it.

There is, consequently, no necessity for a bill of discovery in this court for such a purpose. It is true, the statute has not taken away the jurisdiction of this court to compel discovery by vesting a court of law with a similar power; but it is a rule here not to entertain a bill of discovery where there is not a clear necessity for it, although at the expense of the party who files the bill: *Jeremy's E. Jur.* 265; *Leggett v. Postley*, 2 Paige's C. R. 601. He may sometimes be unable to pay the costs; and possibly die before they are payable. The defendant, from various other circumstances, may be subjected to loss of costs. Hence the liability to pay costs is not a sufficient reason why a defendant should always be compelled to answer such a bill.



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If, besides the mere production and disclosure of written instruments, the bill seeks to elicit facts within the personal knowledge of the opposite party and which cannot otherwise be proved, this court will, of course, compel it here: because the court of law has not power to such an extent. But the present is a case where only books, accounts and letters are required to be produced; and I consider the complainant should be left to seek for their disclosure by the power of the court of law.

This renders it unnecessary for me to examine the particular grounds of demurrer and the various points taken in support of it. I think the bill, which is for discovery only, is entirely unnecessary; and that the demurrer must be allowed.

Order, allowing demurrer; and dismissing the bill, with costs.


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**HEENEY v. THE TRUSTEES OF ST. PETER'S CHURCH, et al.**

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An injunction obtained by a pew holder, to restrain trustees of a church from pulling it down, dissolved: it appearing that the increase of the congregation and the dilapidated state of the old edifice made it proper.

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August 1st,  
 1836.  
  
**Church.**  
**Pew.**  
**Injunction.**

Bill for an injunction to restrain the trustees of St. Peter's Church in the city of New York and others "from pulling down or prostrating the building called St. Peter's Church in Barclay Street in the city of New York or any part thereof; and from committing any further waste or destruction of the same and to desist and refrain from all proceedings to build a new church on the said premises."

The main part of the church was erected between the years one thousand seven hundred and eighty and one thousand seven hundred and eighty-nine and the sacristy or vest-

try and the portico in front, with the galleries and pews, were erected in or shortly after the year one thousand seven hundred and ninety-two. The expense of these erections was defrayed by voluntary contribution.

About the sixteenth day of April one thousand seven hundred and ninety-four, the then trustees of the church caused the following notice and rules, in relation to a sale of the pews, to be published:—

“ST. PETER'S CHURCH.

The trustees of St. Peter's Church having determined to make sale of the pews of said church, have appointed the 21st day of this month (April,) being Easter Monday, for that purpose. The sale to begin at eleven o'clock; and in order to avoid all cause of jealousy and distinction or complaint for the time to come, have (in vestry assembled) adopted the following rules and regulations, viz:

I. No preference to be given to any person whatever, but each pew to be disposed of to the highest purchaser as agreed upon on the day of sale and an annual rent to be paid for each pew.

II. The rent of each pew to be paid quarterly, that is to say; every three months.

III. That every person put in possession of a pew in said church shall, in future, be deemed the right owner and have his or her name entered in the church book.

IV. That on all future occasions the subscribers shall be equally entitled to the preference of any vacant pews.

V. That no person, not being a subscriber, shall get a vacant pew whilst a subscriber or his or her heir wanting a pew shall apply for it.

VI. That the highest subscriber at all times wanting a pew or willing to exchange his pew shall have the preference of a vacant pew.

VII. That no person shall be allowed to sell or give his or her pew to any friend or stranger, but it shall descend in right only to such relation as would be his or her heir at law, provided such heir belong to said church.

VIII. That every pew vacated for three years without a lawful claimant, shall be the property of such person who gets it by his subscription; but if the former owner should

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return, such person shall be entitled to the first vacant pew.

IX. That any person that shall be known to let his pew or any part thereof for more than the just value, according to the yearly rent, shall be dispossessed of it or fined as a trafficker in the church. The fine to be given to the poor.

X. That every person who shall neglect to pay the rent of his pew for six months after it becomes due, shall be dispossessed of it and the pew given to another.

April 16th, 1794"

On the day appointed for the sale of the pews under the above conditions, the complainant became the purchaser of one pew, then known as No. 75, and now as No. 74, for the sum of thirty-one dollars and seventy-five cents and at the rent of twelve dollars and fifty cents per annum.

The complainant occupied and used the pew for thirty-nine years thereafter; but for the last two years he had been an inhabitant of Brooklyn and a pew-holder there, and, consequently, had not used his pew in St. Peter's during such period of two years.

He had been a trustee of the church for some years—but was not, at the time his bill was filed. The prayer for relief was, to the effect of the prayer for the injunction, with the addition that the trustees might be restrained from disturbing the complainant in the enjoyment of his pew and compelled to maintain and keep the present building in repair so that the complainant and other pew-holders might be protected in the enjoyment thereof.

The defendants, in their answer, set forth the ruinous condition of the edifice; and stated that, for safety in entering the church, it was necessary to remove the whole internal central frame work of the roof and all the plastering attached thereto. Also, that a reparation would cost more than two thirds as much as the reasonable cost of a new building. Likewise, that the religious society attached to the church had, for several years past, become so numerous that it was altogether insufficient for their reception and, in consequence, the aisles had been generally so crowded on holidays as to render the pews sometimes inaccessible and hundreds of members, females, children and aged persons, as well as others, attended service on the Sabbath

without the walls of the church and were exposed to every inclemency of weather and to the gaze and observation of profane and irreverent persons.

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The defendants admitted they had, for the promotion of public worship and the more convenient preaching the gospel and administration of the rites of their religion, resolved, by a corporate bye law or resolution, to take down the old church and erect a large and durable house of worship adequate, by its enlarged size and other accommodations, to the convenient reception of as large a number of persons as would probably ever desire to attend it; and had proceeded to take down the present building and remove the ground around, when they were stayed by the process granted in this cause.

A preliminary injunction had been granted; and a motion was now made to dissolve it.

*Mr. Charles O'Connor*, for the trustees and in support of the motion.

*Mr. James Lynch*, contra.

**THE VICE-CHANCELLOR:**—We have here a motion to dissolve an injunction granted to a pew-holder against the trustees of St. Peter's Church, restraining them from pulling down and prostrating the present edifice.

It appears that on a sale of pews in the year one thousand seven hundred and ninety-four, the complainant became the purchaser of one: under certain written rules. He had gone on occupying and paying rent for it until two or three years ago, when he removed to Brooklyn and where he now goes to church. The trustees have resolved to pull down the present structure and erect a church of larger dimensions, so as to accommodate an encreasing congregation—the present building not being sufficient for the followers of the church. It also appears that the church is too much dilapidated to allow of repairs, save at a very serious cost.

A question arises as to the right of the complainant to restrain the trustees?

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It is necessary to turn to the conditions upon which the pews were sold in the month of April one thousand seven hundred and ninety-four. By the seventh clause of these conditions, no person was to be allowed to sell or give his pew to a friend or stranger, but the same was to descend in right only to such relation as would be his heir at law, provided the latter belonged to the church. Thus, the party who originally purchased became entitled to something like a qualified fee. The trustees contend that this is a right which must be subject to their control so far as the pulling down of the church is requisite and so long only as the present erection shall stand. This is so, as a general rule. The right to a pew gives no right to the soil. It gives only a limited estate. The law upon this subject is no doubt rightly laid down in the case of *Freligh v. Platt*, 5 Cowen, 494; and there it was decided that a sale of pews in a church is not a disposition of real estate; the grantee acquires a limited usufructory right only. He may use the property as a pew; but he has not an unlimited absolute right. He cannot use it lawfully for purposes incompatible with its nature. The right, too, is limited as to time. If the house to which it was an appurtenant be burnt or destroyed by time, the right is gone. And hence, in the present case, it is contended that upon a pulling down and rebuilding, where the accident of time has made it necessary, the pew-holder's right is gone.

This would seem to be in accordance with the principles which govern the English Ecclesiastical courts; and I am inclined to say these principles are also to be considered as a part of the common law. In those courts it is considered that pews of a church are for the benefit of the parishioners generally. The churchwardens have the control of them; and their duty is to assign a pew to each parishioner. When this is done, the person to whom it is assigned becomes entitled to the possession. Pews in some instances are appurtenant to particular dwelling houses, so that the occupier of the house enjoys it. In general, however, pews remain subject to the regulations of the churchwardens. If they want to accommodate more persons, they can make changes. And where a parishioner requires a more per-

manent seat or location, he can apply to the bishop for what is called a "faculty;" and under it the party gets a right even greater than falls to the lot of an ordinary parishioner: and yet this faculty does not run to a man and his heirs. It may attach to a house or to a person: but not to heirs. There are various cases to show this in the reports of Haggard and Phillimore;(a) and also the case at law of *Stocks v. Booth*, 1 T. R. 428, where it was held, (referring to Burns' Ecclesiastical Law) that even possession for above sixty years of a pew in a church is not a sufficient title to maintain an action upon the case for a disturbance in the enjoyment of it. The plaintiff must prove a prescriptive right or a faculty and should claim it in his declaration as appurtenant to a messuage in the parish. It was also held that a faculty to a man and his heirs is bad. I do not see why these decisions should not have force in the present case.

Here, it is true, there is a written contract, whereby a purchaser became an owner and the right would devolve to his heir, provided the latter became and was a member of the church. I think, however, there is no necessity to pass definitively upon the construction of this contract. The trustees deem it necessary to rebuild; and whether Mr. Heeney (the complainant) has a title or not, is a matter which can be passed upon hereafter, when he comes to claim a pew in the new building. There is no just reason why the trustees should be restrained.

No charge is made of any impropriety in regard to the funds; and it is admitted that a new edifice on this site will be beneficial and that the whole property is still to be used for the purposes of the church. In the mean time the complainant will be put to no inconvenience: for it is shown that he is in the practice of attending church at Brooklyn where he resides. The case is a novel one; but after considering it in all its bearings, I deem it most desirable to

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(a) As, for instance, *Tattersall v. Knight*, 1 Phill. R. 237; *Fuller v. Lane*, 2 Add. R. 426; *Walter v. Gunner*, 1 Hagg. 321. See also, *Partington v. Rector, &c. of the parish of Barnes*, 2 Lee's R. 345; *Pitman v. Bridgman*, 1 Phill. 394; *Blake v. Osborne*, 3 Hagg. 723.

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let the trustees go on and prostrate the present old building—leaving the complainant to his legal and equitable rights with regard to a pew in the new building when it is completed. If there were no good ground for the acts of the trustees, I might do otherwise. As it is, let the injunction be dissolved.

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**WOODHULL, executor of Post, deceased v. OSBORNE, et al.**

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The English practice of opening biddings upon an offer of a greater price has not been adopted in New-York. Nor will the court order a re-sale merely because the property will sell for more (except, perhaps, where the mortgagee buys for less than the amount of his mortgage and the mortgagor will remain liable for all deficiency on a re-sale.)

Where a stranger purchases at a chancery sale in good faith, something more must appear than a mere offer of a higher price to induce a re-sale. There must be fraud or misconduct of the master or person controlling the sale—or surprise upon the party interested—or his having been misled as to time and place by the purchaser or some person connected with or having the management of the sale. If the party interested be of full age and under no disability, he cannot be permitted to allege his own negligence or inattention as the cause of his surprise or mistake; and a sale cannot be opened if this appears.

Unless a decree directs the master to subdivide and sell land in parcels, he is not compelled to do so.

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**August 15, 1836.** Bill of foreclosure, upon a mortgage made by the defendants Orlando C. Osborne and Margaret Anne his wife of ground at Bloomingdale in the twelfth ward of the city of New-York. A decree for sale was had; and, under it, Master Ruggles sold the property to Elias L. Philip for the sum of nine thousand dollars.

**Mortgagor and mortgagee.** Prior to the master's executing any deed to the purchaser, a petition was presented to the court. It purported to be the petition of John Lorimer Graham, Joseph Lawrence and James B. Taylor, assignees of Stephen Hendrickson; and set forth that in the year one thousand eight hundred and thirty-five and before the first day of June in the said

**Foreclosure. Redemption. Cestui que trust and trustees.**

year the defendant, Orlando C. Osborne, (a broker) was employed by Stephen Hendrickson to purchase real estate for him, and to take the titles in his, Osborne's, name and execute bonds and mortgages for parts of the purchase monies. That the said Orlando C. Osborne, in pursuance of such employment, and acting as broker on behalf of the said Hendrickson, made a purchase of the ground thereafter described (and being the same, premises as were sold to the said Mr. Philip as aforesaid) for twelve thousand dollars; and to secure the payment of a part thereof did, on or about the first day of June in the year one thousand eight hundred and thirty-five, duly execute to the complainant a bond for four thousand dollars payable in one year with interest; and, on the same day, the said Osborne and his wife did execute a mortgage to the same complainant as further security upon a parcel of ground in the twelfth (late ninth) ward of the city of New-York, being the premises alleged to have been purchased by the said Osborne for Stephen Hendrickson. Also, that the said Orlando C. Osborne gave a bond and mortgage upon the same property to William Post, as well as a bond and mortgage to one Jehiel Jaggar. That on the tenth day of November one thousand eight hundred and thirty-five the said Stephen Hendrickson conveyed all his real and personal property to the petitioners for the benefit of his creditors. That the complainant had filed his bill of foreclosure upon the mortgage given to him by Osborne; a sale was decreed; and the said parcel of ground was struck off as above mentioned for the sum of nine thousand dollars. Also, that the purchaser had paid the deposit required by the conditions of sale and would be entitled to a conveyance on the twenty-seventh day of July then instant upon paying the balance of the purchase money. That the sum bidden for the ground by the said Elias L. Philip exceeded the amount due under the decree in the foreclosure suit, but was less, by three thousand dollars, than the cost of it and from seven to nine thousand dollars less than the petitioners could make it produce. And the said Petitioners further shewed that they were willing to pay the principal, interest and costs in the cause or procure a purchaser at a much larger price than

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the ground was knocked down for; and that the difference between the fair market value and the sum at which the premises were sold would be lost to Hendrickson's creditors, unless the Petitioners should be allowed to redeem and the sale be vacated. Also, that the said Stephen Hendrickson had not been made party to the foreclosure suit. Prayer, that the sale be vacated and the Petitioners allowed to redeem.

*Mr. E. Sandford*, in support of the petition.

*Mr. R. Sedgwick*, for the purchaser.

*Mr. James J. M. Valentina*, for the complainant.

*August 15.* THE VICE-CHANCELLOR:—Supposing the petitioners, Hendrickson and his assignees, to have an interest in the mortgaged premises, so as to give them a standing in court; the first question is, whether enough appears to authorize the court to set aside the sale and permit them to redeem or have a re-sale?

This question is between the Petitioners and the purchaser *Mr. Philip*. The mortgagees are indifferent about it: because, in any event, they will be paid in full. On the first hearing of this motion, I was inclined to think it was a case in which the court could, with propriety, set aside the sale provided the Petitioners had a right to make the application.

Upon reflection, however, and looking more attentively into the cases cited, I am of opinion that the circumstances do not warrant the court's interference to disturb the sale.

The English practice of opening biddings upon an offer of a greater or advanced price has not been adopted by us; nor will the court order a re-sale merely because the property will sell for more money: except, perhaps, in the single instance of the property selling for less than the mortgage debt, the mortgagee or party filing the bill becoming the purchaser and the party, asking a re-sale, remaining liable for the deficiency: *Lansing v. McPherson*, 3 J. C. R. 414. Where a stranger or third person becomes the purchaser in

good faith, something more than a mere offer of a higher price must appear to induce a re-sale:—such as fraud or misconduct of the master or other person having the control of the sale—or surprise upon the party interested—or his having been misled as to the time and place of sale. Where circumstances of the latter description are relied upon, the party must show they proceeded from or were caused by the purchaser or some person connected with or having the management of the sale. If he be of full age and under no disability, he cannot be permitted to allege his own negligence or inattention as the cause of his surprise or mistake. These principles are fairly deducible from the cases of *Williamson v. Dale*, 3 J. C. R. 290; *Duncan v. Dodd*, 2 Paige's C. R. 99; *Collier v. Whipple*, 18 Wend. 224; *Baring v. Moore*, 5 Paige, 48.

Here, the purchaser is not a complainant but a stranger to the parties and to the suit, who, attracted by the public advertisement of sale, attended and fairly bid for the property. He was declared the purchaser; and bound himself to perform the terms and conditions of the sale. The court is obliged, on the ground of good faith with such a purchaser, to carry the sale into effect: unless there are special circumstances (such as those which have been adverted to) forbidding it.

The petition attempts to put the claim to relief upon the ground that the Petitioners were lulled by the promise of the complainants not to proceed to a decree and sale without first giving them notice; and that the sale took place without their being at all apprised of it. So far as such promise is alleged to have been made, it is expressly denied by the complainants; and as to the Petitioners or Hendrickson not being apprised of the time of sale, it appears to me it was clearly the result of their own remissness or inattention or that of Osborne, the mortgagor, who, in the transaction of purchasing the property and taking the title in his name and giving the mortgages, is clothed with the character of agent or trustee for Hendrickson. According to Osborne's statement, he was fully aware of the master's advertisement of sale, he answered enquiries respecting the property and the sale, and, if Hendrickson did not re-

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ceive information of the fact that it was advertised, it was his own fault or that of his agent. Knowledge of the agent in such case may be considered the knowledge of the principal. And it is not sufficient that Osborne himself supposed the property would not be sold or, if sold, that the sale would be a mere formal one and, resting under this impression, that he diverted bidders and did not attend. In what way and from whom he got the impression does not appear. It is not traced to the master or the complainants in the cause; and nothing is said to induce a belief that it originated with or proceeded from any act, promise or declaration of any one having the control or management of the sale.

I am of opinion, therefore, that the circumstances of this case do not bring it within any of the principles upon which this court has heretofore interposed to deprive an honest purchaser at a master's sale of the benefit of his bargain. It may be a serious loss and sacrifice of the property, but the parties having or supposing they had an interest in it, should have been more vigilant and attentive to the result of the foreclosure which they knew had been commenced.

The manner of selling the property, in one entire parcel, is objected to as irregular; and it is said, the master ought to have divided it into lots and sold only so many as were necessary to satisfy the mortgage debt. It is a sufficient answer to this objection that the property was purchased in one parcel, described as containing four acres, mortgaged as such, and, by the same description, was decreed to be sold. If the parties wished a subdivision into lots for the purpose of a sale, they should have attended the entry of the decree and asked for directions to that effect or have requested the master, before the sale, to make the subdivision. Unless there were directions in the decree or a request from the parties, the master was not bound to take upon himself the duty of laying the land out into lots; nor were the mortgagees under any obligation to do so. They were at liberty to sell it as it was mortgaged: in one parcel; although, if they had apprehended a deficiency and thought it to their own advantage, they might have asked leave for the master to sell in lots according to a survey

and map to be procured at the expense of the estate. Whatever disadvantage there was, if any, in selling in an entire parcel, must now be attributed to the neglect of the parties in interest, other than the mortgagees, and cannot affect the rights acquired by the purchaser at the sale.

If these views of the case are correct, it is unnecessary to consider the objection raised on the part of the purchaser against disturbing the sale: that the petitioners—or Hendrickson in whose place they stand—have no interest in the property and can claim no benefit from it.

It appears to me, however, that the transaction between Hendrickson and Osborne, as disclosed in the petition, is within the 1 R. S. 728, § 51, which forbids the raising of a trust in favor of a person paying the consideration money upon the purchase of land, where he voluntarily allows the grant or conveyance to be made to or in the name of another. This provision in the statute was doubtless intended to prevent the practice resorted to in this instance. The law now considers that there is no reason why a person, who is able to advance money for the purchase of landed estate, should allow the title to be taken for his benefit in the name of another, except for some sinister or fraudulent purpose; and it will not allow him to claim any benefit of the transaction in the shape of a resulting or implied trust.

In the present case, Osborne buys the property; takes the title in his own name; and gives a mortgage for a part of the purchase money, although merely broker or agent for Hendrickson, who advanced the money actually paid. This is not such a transaction as will raise a trust in favor of Hendrickson.

But while the law prevents him, who will thus advance his money and permit the title to be taken in the name of another, from deriving any benefit from the purchase, it takes care that his creditors shall not suffer by his parting with his money; and hence the provision in the next two sections, raising a trust in the land in favor of the creditors of the person paying the consideration money, and also in favor of the person himself where a conveyance is taken

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in the name of another against his consent or without his knowledge and in fraud of his rights: § 51, 52. This case is not within the principle of either of the last mentioned sections. Hendrickson's creditors are not parties to this application, nor are they shown to be interested.

The petition must be dismissed.

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**HOLCOMB v. JACKSON.**

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A party in interest summoned before a master, is not guilty of a contempt for non-attendance, where neither he nor his solicitor has been served with the order upon which the summons is based.

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August 22,  
 1836.

  
**Practice.**  
**Master's**  
**Summons.**  
**Contempt.**

Judgment-creditor's bill. An order had been granted for the appointment of a receiver and that the defendant be examined as to his property; but no copy of it had been served either upon the defendant or his solicitor. For the purpose of appointing such receiver, the complainant took out a master's summons, having the following underwriting: "To appoint a receiver in this cause of all the real and personal, the legal and equitable estate and property, things in possession and choses in action of the defendant, *Mortimer M. Jackson*, with the usual powers." The defendant, under advice of counsel, did not attend before the master; and a motion was made that the party be attached.

*Mr. Howard H. White*, for the complainant.

*Mr. D. Graham, Jr.*, for the defendant.

**THE VICE-CHANCELLOR:**—The practice is not very well settled as to the effect of a master's summons in a case like the present.

It appears that no service was made of the order of reference; and the counsel for the defendant contends that, although a party may be in contempt for not obeying an or-

der, yet he is not liable to an attachment for not appearing upon a master's summons. Is this so?

I consider the summons of the master, when taken alone, to amount to no more than a notice and that it cannot, where the order upon which it is founded has not been served, be the groundwork of an attachment. Here we have a summons which merely shows, in its underwriting, that a receiver is to be appointed with usual powers: having no reference to the date or particulars of any order. For the purpose of bringing the party into contempt, there should have been service of a copy of the order or the master should, in the summons or in its underwriting, have referred to the order and said that the defendant was to submit to an examination. If this had been done, then a default in the defendant's attendance would have amounted to a contempt. At present he is not in contempt.

Motion denied,

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v.  
BROWER.

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BROWER v. BROWER.

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A master's report upon a receiver's accounts need not be confirmed and cannot be excepted to. If a party be dissatisfied, he should ask leave of the court to review the principle upon which the accounts are taken so far as the objectionable items are concerned.

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A receiver had been appointed. After the final decree in the cause, a reference was had to a master for the purpose of settling the receiver's accounts, who had received monies and paid them, from time to time, into court. When the receiver was thus before the master, one of the parties objected to the allowance claimed by the receiver for his services, as well as to items in his accounts. The master, however, allowed the claim and passed the accounts as presented. On the settlement of the master's report, the party who had objected, by *Mr. Hawes* as his counsel, filed his objections with the master, but which the latter overruled.

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1836.  
Practice.  
Receiver's  
Accounts.

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v.

BROWER.

He then excepted to the report; and gave notice of hearing upon the exceptions.

Mr. *H. E. Davies*, opposed.

**THE VICE-CHANCELLOR**:—It is not the English practice to allow exceptions in a case like this; and, in the absence of a rule of our own, I consider we must be guided by the mode pursued in England. The receiver passes his accounts before a master. The master makes out and files his report, which requires no order of confirmation. Nor can exceptions be taken to it. Where a party thinks himself aggrieved, the proper application is to the court to review the account as to such parts as are objectionable; and then the court will enter into the consideration of objections as to the general principles on which the master has proceeded in taking a receiver's accounts, although it will not take cognizance of objections to particular items in them.<sup>(a)</sup> The practice is laid down in *Shewell v. Jones*, 2 S. & S. 170, confirmed on appeal, 3 Russ. 522.

In the present case, then, there should have been an application to review the report in certain particulars.

Perhaps, in this particular case, it is hardly worth while to send the cause back. I will, therefore, hear it as the matter now stands: but all parties, including the receiver, must have notice.

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(a) And on a motion for this purpose, each particular in the account complained of, as also the grounds of objection, must be specified in the affidavit or notice. Too much precision cannot be observed in this respect, particularly as to dates; if there are several accounts, each, and which, must be specified: *Smith on Receivers*, 177, referring to *M. S. case of Casson v. Doran*.

VICE-CHANCELLOR'S COURT.

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COOPER.

v.

NORWOOD.

COOPER and another v. NORWOOD.

The annexing an affidavit to an injunction bill (Rule 37,) where an oath is waived, should be done when the bill is filed. It is not to be sanctioned after answer.

The complainants had waived an oath to the answer of the defendant. The latter, however, had sworn to it; and now applied to dissolve the injunction.

October 3,  
1836.

At the same time, the complainants moved that an affidavit, made by one J. M. C., might be annexed to and filed with the bill and have the same effect as if it had been originally filed and annexed thereto. In order to support the latter motion, the solicitor for the complainant deposed that "previous to drawing the bill and at the request of the deponent, the said J. M. C., a disinterested and credible witness, drew up, in writing, a statement of the facts within his knowledge of the complainant's case, which would be necessary to draw the affidavit allowed to be annexed to and filed with the bill in such cases. That the said defendant having directed his attorney to commence a suit at law against the said complainants, to restrain which said bill was filed, the said bill was necessarily prepared in haste, in consequence of which the said affidavit was omitted to be annexed. That the copy of the bill served on the defendant's solicitor was not prepared by this deponent personally, nor did any thing occur to suggest to the deponent the absence of such affidavit until the coming in of the defendant's answer; that on comparing the answer with the bill and on the tenth day of September instant it first struck the deponent that such omission had been made."

Practice.  
Annexing  
affidavit to  
bill.



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COOPER

v.

NORWOOD.

Mr. Robertson, for the complainants.*Mr. Blatchford*, for the defendant.

THE VICE-CHANCELLOR:—As to the application now to annex an affidavit to the answer:—This practice, of attaching an affidavit, made by a disinterested person, to an injunction bill was introduced by the 37th Rule. It may be done, where the defendant's oath is waived; but it is not absolutely required.

In the present case, it was not done when the bill was filed; and it is now, for the first time and after an answer has become perfect, asked to be allowed. The affidavit in support of the present motion is not positive as to the intention to make out and annex an affidavit when the bill was prepared; and it appears that the solicitor for the complainants was not struck with, what he calls, the omission, until he compared the answer with the bill. If such a motion as the present can be tolerated at all, I think it ought clearly to appear that the intention, to file the affidavit with the bill, existed at the time, and that the omission was purely accidental.

I consider the rule allowing an affidavit to be annexed should be strictly observed. A party has no right to wait until the coming in of the answer and then, upon finding the necessity of the thing, ask for permission. This motion cannot be granted.

Motion denied, with costs; and the injunction was dissolved, in consequence of the answer having denied the equity of the bill.

1836.

IN THE MAT-
TER OF THE
GLOBE
INSURANCE
COMPANY.

In the matter of the Receivers of the GLOBE INSURANCE
COMPANY.

On the petition of BRAINE and others.

Money was borrowed from a Fire Insurance Company, in order to erect a building upon the mortgaged premises. When the building was up, it was insured in the same office by the mortgagors. A fire destroyed it and, at the same time, rendered the Insurance Company insolvent. Held, that the loss by fire might be set off against the bond and mortgage.

In the year one thousand eight hundred and twenty-eight, *October 4th,*
the petitioners obtained a loan from the Globe Insurance
Company of four thousand five hundred dollars, for the pur-
pose of erecting a building upon a lot of ground belonging
to them and known as No. 110 Pearl Street in the city of
New York; and for securing the repayment, with interest,
they executed to the said company their bond and a mort-
gage of the premises.

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Set-off.
Insurance.

When the building was erected, they procured an insur-
ance, by the said company, upon the same, to the amount
of three thousand dollars against loss or damage by fire.
This insurance was continued, by renewals; and subsisted
at the time of the great fire in the month of December one
thousand eight hundred and thirty-five, when the building
was destroyed, it being then worth more than the policy:
so that the company became liable to pay the whole sum
insured. Proofs to this effect were furnished; the liability
of the company for a total loss was admitted; and, at the
end of sixty days, the money became payable according to
the terms of the policy.

By the same fire, the company were rendered insolvent;
and the petitioners now prayed, for an order upon the re-
ceivers of the property and effects of the company to allow

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 IN THE MAT-
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 COMPANY.

a set-off to the amount of loss upon the policy of insurance, against so much of the money as was due on their bond and mortgage—offering to pay the balance.

Mr. Isaac A. Johnson, for the petitioners.

Mr. H. G. Rankin, for the receivers.

THE VICE-CHANCELLOR:—As between the company and the assured, there would be a clear right of set-off at law. In a suit upon the bond by the Globe Insurance Company, the petitioners might avail themselves of the present statutory provisions on the subject of set-off; and claim that the loss which had accrued upon the policy should be deducted from the bond and the balance only considered the debt due from them.

There are here all the requisites of a set-off:—a demand arising upon contract—due to all the petitioners jointly in their own right—liquidated or capable of being ascertained by calculation—and existing and belonging to them at the time of commencing the suit, provided a suit should be now commenced, and the suit thus commenced being for a demand of such a nature, namely, the bond debt, which could itself be the subject of a set-off: 2 R. S. 354.

The question then is: whether the insolvency of the Globe Insurance Company and the placing of all its property and effects in the hands of receivers, for the benefit of creditors, has taken away the right of set-off?

There is nothing in the various provisions of the statute, in relation to the dissolution of insolvent corporations and the duties of receivers, which can have such an effect. On the contrary, the right of set-off is recognized, while, at the same time, the principle of an equitable distribution among creditors of the assets of insolvent corporations, like those of insolvent and absconding debtors under the statute, is adhered to and declared.

By the act of the last session, passed 18 January, 1836, and by virtue of which act the present receivers of the Globe Insurance Company were appointed, it is declared that receivers shall have all the powers and authority conferred

and be subject to all the obligations and duties imposed upon receivers under any law of this state; and by turning to the general law, in relation to receivers of insolvent corporations, we find, with respect to their powers and authority and the duties and obligations imposed upon them, that they are placed upon the same footing as assignees or trustees of the estates of insolvent debtors: 2 R. S. 464, § 42; Ib. 469, 470, § 68, 72, 73, 74. And by recurring to those powers and duties, it will be seen that, in the enumeration of them and particularly in declaring that such trustees shall have power to sue in their own names, the right of set-off in the party sued is expressly provided for, taking care to restrict it to debts owing before public notice of the appointment of the trustees or of the commencement of proceedings by which they become by relation vested with the estate: 2 R. S. 41, § 7; and where mutual credit has been given by any debtor and any other person or mutual debts have subsisted between such debtor and any other person, the trustees are expressly authorized, without any suit or action being instituted, to set off such credits or debts and to pay the proportion or receive the balance due: 2 Ib. 47, § 36.

A similar provision is contained in the English Bankrupt Law in cases of mutual debts or where mutual credits have been given, and it is the common practice to allow set-offs there—taking the balance as the debt really due which the debtor of the bankrupt pays to the assignees or, when the bankrupt is the debtor, upon which the creditor receives his dividend equally with other creditors.

When rightly considered, there is nothing in all this that can militate against the principle of equality being equity among the creditors of a bankrupt or insolvent estate: for where parties have had dealings so as to produce mutual debts or credits or reciprocal demands growing out of the same transaction, it is the balance only which exists as the debt: *Reab v. Mc Alister*, 8 Wend. 115; and a set-off in such case is not a means of paying one debt in preference to other debts which the bankrupt or insolvent owes; for, to the extent of the demands set-off or compensated, there was no debt—from the moment they were contracted, they

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extinguished each other. Hence, the operation of a set-off is, not to pay, but to ascertain a debt made up of the difference between the amounts of respective debits and credits.


The case under consideration may be regarded as one of mutual credit; and the respective demands as arising out of the same transaction. The Insurance Company lends its money upon the security of a bond and mortgage; and, at the same time, they agree to insure the building. Now, insurance companies generally make it a condition upon which they consent to lend their money on bond and mortgage that the borrower shall effect an insurance with them; and if not an express, there is, certainly, an implied understanding that the loss, if any, upon the policy, shall go towards extinguishing the bond debt.

A court of equity will go as far as a court of law in enforcing such an understanding; and for these reasons, I am of opinion the receivers are bound to allow the set-off claimed by the petitioners.

TAGGARD v. TALCOTT.

In a judgment creditor's suit, the defendant showed that years before he had received a sum from his wife's father, in her right, and placed it to her credit upon his books, with the understanding that it was to be her separate property and all furniture purchased with it was to be carried to the account of the fund as her sole property. On an attempt, by the judgment-creditor, to reach the furniture, the wife petitioned to have her equitable rights in it preserved: Held, that she was entitled to have it protected as her separate property.

Although a judgment-debtor was advised by counsel that he might collect money previously earned and apply it together with money in his possession, to purchase family supplies, yet, as it was an infringement of the injunction, an attachment was granted.

Nov. 21st,
 1836.

 Debtor and
 Creditor.

Judgment-creditor's bill. The defendant, by his answer, showed that in the year one thousand eight hundred and twenty-nine, he received from his wife's father, in her right, three thousand nine hundred and forty-five dollars; and placed the same to her credit upon his books, with the understanding that it was to be her separate property and all furniture purchased with it was to be carried to the account

of this fund as her sole property. That the defendant was at that time rich. That he credited his wife in his ledger, but by neglect, he did not charge all the furniture which had been purchased; having debited her with only two hundred and seventeen dollars and sixty-five cents on that account.

A notice of motion for an attachment on the ground of the defendant's having infringed the injunction granted in the suit and because he did not give up the furniture had been served; and a petition, on behalf of the wife, asking that her equitable rights in the furniture might be protected, was to come on at the same time.

Mr. Charles Edwards, for the complainant.

Mr. Henry W. Warner, for defendant and *Mrs. Talcott*.

THE VICE-CHANCELLOR:—According to the statements in the petition and the answer of the defendant, I think the wife is entitled to be protected in the enjoyment of the household furniture as her separate property. It was purchased with the money which her husband had received from her patrimonial estate and under an agreement that whatever was thus purchased should be considered the wife's separate property. Under the circumstances, this court will hold the husband to be the trustee of it for the wife; *Atherly*, 330.

As between the husband and wife, she has an equity to have the agreement enforced and the property settled upon her; and the husband's creditors, claiming for debts subsequently contracted, stand in no better situation, with respect to this equity of the wife's, than the husband himself. The complainant, as one of such creditors, is obliged to come here for aid to recover his debt. He is dealing with a court of equity; and this court will not extend its aid to him, without first protecting the equitable rights and property of the wife: *Clancy*, 476.

This protection can be granted to her against her insolvent husband and his assignees, upon the petition of the wife: *Atherly*, 345.

I am of opinion, in this case as it now stands, that the

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TALCOTT.

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 v.
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complainant has no right in equity to have the household furniture in question given up to the receiver for his benefit.

With respect to the motion against the defendant for an attachment for breach of the injunction. The injunction could not operate to prevent him from receiving and applying the proceeds of his subsequent earnings to the support of himself and his family : but he had no right to collect money previously earned and then due to him or to apply money then in his possession or under his control to the payment of other debts, although small ones and contracted for family supplies. This, it appears he has done, although under the advice of counsel and not supposing that he was thereby violating the injunction ; yet it is a disobedience which amounts constructively to a contempt and affords a sufficient ground for awarding an attachment in the first instance.

Order accordingly.

LEGGETT and others v. BOORUM.

While an injunction under a judgment-creditor's bill was upon furniture, it was taken and sold under a distress for rent. There was no other property. The court allowed the complainant to dismiss his bill without costs.

Nov. 21st,
 1836.

Debtor and
Creditor.
Costs.

Judgment-creditor's bill ; and answer, denying property : but setting forth that, while the complainant's injunction was in force, the defendant's furniture had been sold under a distress for rent.

Mr. J. M. Bizby, for the complainants.

Mr. Rowley, for the defendant.

THE VICE-CHANCELLOR :—This case appears to fall within the rule laid down in *Smets v. Williams*, 4 Paige's C. R. 367, and exonerates the complainants from paying the defendant's costs on dismissal of the bill. Some specific property, namely, household furniture, is pointed out which the

complainants had some reason to believe might be applicable to their judgment, but which was afterwards swept off by a landlord's warrant. It was sold for more than one hundred dollars. The complainants are willing to have their bill dismissed ; and, under the circumstances, they are entitled to have it dismissed, each party paying their own costs.

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EAGLE
INSURANCE
COMPANY
v.
PELL.

THE EAGLE FIRE INSURANCE COMPANY v. PELL, *et al.*

Where a mortgagor or owner of an equity of redemption refuses or neglects to pay taxes due upon the mortgaged premises, the mortgagee may pay them for his own protection and add the amount to his claim ; and if there be a deficiency upon a foreclosure and sale to meet such payment of taxes, the mortgagor is liable for the same upon his bond or covenant.

And where the mortgagor has sold the mortgaged premises subject to the mortgage and the mortgagees take a bond from the buyer for repayment of money paid by them for taxes, such bond will not, necessarily, bar the mortgagees from their remedy against the original mortgagor on account of such payment : the bond not being of a higher nature than the original bond and mortgage—it is collateral and not substitutional. If the liability of the mortgagor has been discharged, it is for him to show it.

The complainants had filed their bill to foreclose the equity of redemption in two mortgages, given to them by the defendant, Ferris Pell, on several parcels of property and for a sale of the same. The amount of principal and interest reported due was thirty-two thousand two hundred and seven dollars and seventy-six cents. On the twenty-first day of January one thousand eight hundred and thirty-one, the usual decree for a sale of the mortgaged premises or so much thereof as should be sufficient to raise the amount due to the complainants for principal, interest and costs was had and out of the proceeds the master was to pay such amount into court and if there happened to be a deficiency, the master was directed to specify the amount of it in his report of sale : but the decree provided that no process of execution should be had for the payment of such deficiency

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Mortgagor
and mort-
gagee.
Taxes.

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and the defendants were to be left to their liability for the same in any suit or suits at law thereafter to be instituted on all or any of the bonds mentioned in the bill of complaint; and the complainants were authorized to institute any suit or suits at law for a deficiency.

The property was not sold under this decree until the twelfth day of February one thousand eight hundred and thirty-three; and the aggregate of sales was then thirty-seven thousand two hundred and seventy-five dollars.

In the meantime, taxes and assessments upon the mortgaged premises had become due to the corporation of the city of New York, amounting, with interest, to two thousand and eighty-six dollars, which the complainants alleged they had been compelled to pay in order to preserve their security, the property being liable to a sale by the corporation; and they had added that amount to the principal and interest of the mortgage debt and the costs, less a deficiency of one thousand nine hundred and forty-one dollars and sixty-eight cents, which, in the master's final report, was stated to be due from the mortgagor, Ferris Pell, to the complainants.

Exceptions were taken to this report by the defendant, Ferris Pell, upon the ground that he ought not to be charged with nor made personally liable on his bond for the amount of the assessments: and the grounds upon which he claimed exemption were these: that, on the first day of May one thousand eight hundred and twenty-seven, he sold and conveyed the mortgaged premises to Alfred S. Pell, subject to the incumbrances, the purchaser assuming to pay the same and entering into a covenant to indemnify and save harmless the grantor, Ferris Pell, from the payment of the bonds and mortgages and any taxes or assessments upon the lots and from any responsibility or liability by reason thereof. Also that afterwards, when the assessments and taxes became payable (some portion of which had been imposed prior to the conveyance by Ferris Pell to Alfred S. Pell and some afterwards while Alfred S. Pell was the owner) and he being unable to pay the same without aid from the complainants, they, with a view of preventing a sale by order of the corporation and of preserving the security of their mortgages unimpaired, at the request of Alfred S. Pell

agreed to advance to the amount of one thousand eight hundred dollars to be applied to the payment of the assessments—taking his bond and an additional mortgage upon the same premises for the amount, which he accordingly executed and delivered to them under seal of the twenty-fifth day of February one thousand eight hundred and thirty-one. In March following they applied the money to the payment of the assessments and thereby exonerated the premises from the charge or incumbrance. This arrangement was negotiated with the complainants solely by Alfred S. Pell. Hence it was insisted, on the part of Ferris Pell, that, at the time of the sale of the mortgaged premises, there were no assessments constituting a lien or charge to be paid out of the proceeds of sale. That the same had already been paid by means of a fresh loan made to Alfred S. Pell upon his individual bond and mortgage, and in applying the one thousand eight hundred dollars to that object, the complainants acted only as agents of Alfred S. Pell and having his bond they were bound to look to him or his estate for reimbursement and had no right to resort to him (Ferris Pell, on a deficiency, the mortgaged premises having sold for enough to satisfy the amount of indebtedness upon his bonds and mortgages and the costs.

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 PELL.

Mr. G. Wood, for the complainants.

Mr. C. F. Grim, for the defendant, Pell.

THE VICE-CHANCELLOR :—So far as the testimony taken April 4th. before the master goes to explain the transaction and the object of the complainants in taking the bond and mortgage of Alfred S. Pell for the one thousand eight hundred dollars, it appears not to have been considered a loan of money made to him, but an advance from necessity, to protect their original mortgage security, they applying the money themselves to the payment of the demands upon the property by the corporation and *ex abundanti cautela* taking Alfred S. Pell's bond and mortgage in order to bind him personally for the amount, at the same time it was intended to be collateral to the original bonds and mortgages of Ferris Pell and by no means a relinquishment of any

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liability he might be under to them for the amount of the assessments, but an additional security for the same; and that the complainants looked to the proceeds of the mortgaged premises, when the same should be sold, for the repayment of such advances.

It is not shown, however, that Ferris Pell was consulted or ever agreed to consider the transaction in this light. Nor do I think there is enough to warrant the inference that he so understood it, although it appears that, at his solicitation, the master's sale of the mortgaged premises under the decree was several times postponed, in order that the property might sell to the greatest advantage "as he would be personally liable for any deficiency." But his apprehension on this subject may have arisen solely from the magnitude of the debt and the costs of the proceeding without taking taxes and assessments into the account. There seems to be no doubt, however, of the fact, as to the understanding of the complainants or the officers of the company that it was not to affect their right to reimbursement out of the proceeds of the property and of their intention to hold Ferris Pell, as well as Alfred S. Pell, personally liable, upon their respective bonds, for any deficiency, after the amount of the assessments were repaid.

How then does it stand in point of law? Taxes and assessments are a charge upon the estate; and the lien thereby created takes precedence even of a prior mortgage, and, if not paid, may defeat the security of the mortgage. If, consequently, the mortgagor or owner of the equity of redemption refuses or neglects to pay, the mortgagee, for his own protection, is justified in paying the amount and may add it to his debt when he proceeds to a foreclosure and sale or when the mortgagor comes to redeem: *Faure v. Wigans*, Hopk. C. R. 283.

In the present case, it appears that the taxes and assessments upon the mortgaged premises had become greatly in arrear; and the circumstances justified the complainants in advancing the money for the purpose of exonerating the estate from such charges. In equity, the complainants are entitled to stand in the place of the corporation and to be reimbursed the amount, with interest, out of the property

or its proceeds ; and if, by taking such amount out of the proceeds when sold, there is not enough remaining to satisfy the principal and interest of the mortgage and the costs of the proceedings, it follows that the mortgagor is liable for the deficiency upon his bond or covenant. *Prima facie* such liability exists here ; and if it has been discharged by any acts of the complainants, the defendant, Ferris Pell, should show it. The taking of the fresh bond and mortgage of Alfred S. Pell is not, *per se*, a discharge. It was not taking security of a higher nature for the same debt or demand so as to merge or extinguish the former. The superadding of Alfred S. Pell's personal liability, by virtue of the bond which he gave for the one thousand eight hundred dollars, to the liability of Ferris Pell which they already had and could resort to, if they should think proper, was rendering the one collateral to the other and not substitutional.

Neither in law, nor, according to the evidence, is Ferris Pell discharged. He is fairly chargeable personally with a deficiency ; and I do not understand the amount, which has been reported, is objected to. The complainants may resort to him or to the estate of Alfred S. Pell or to both. If Ferris Pell should be compelled to pay, he will have his remedy over against the latter upon the covenant of indemnity.

The exceptions to the master's report must be overruled, with costs.

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POWELL v. MURRAY, *et al.*

A deed perfectly gratuitous and voluntary will not, for that reason, be set aside, when free from fraud and when the party has not thought proper to reserve a power of revocation. Where a wife's property (settled upon her) is the subject of a deed, equity looks upon her as a feme sole. Incident to the ownership in her is the power of disposition, without the assent or concurrence of her husband. Such a deed may, therefore, be valid where she has had the benefit of it, even though the husband is made a party and has not signed. She cannot, on this ground, take advantage of it.

A deed acquiesced in for thirty-six years will not be set aside.

Laches and neglect are always to be discountenanced in equity. A party must not sleep upon his rights here any more than at law. And this principle is more particularly applicable to stale demands brought forward and attempted to be supported for the first time after the death of an original party.

Nov. 26, 27,
28, 30,
1835.



*Voluntary
conveyance.
Husband
and wife.*

Elizabeth Inman, of the town of Boston, by her will bearing date the fourteenth day of May in the year one thousand seven hundred and eighty-five, after various bequests therein contained, bequeathed as follows :

" My will is that Mrs. Anne Powell, wife of William Dummer Powell, be paid and receive from my estate hereafter described the lawful interest of two thousand pounds sterling, which interest is to be paid to her annually for and during her natural life and for her own personal use and disposal. And that after her decease the said principal sum of two thousand pounds sterling be paid and distributed to and among her present and future children in equal proportions, that is to say, among those who survive her decease, unless they have issue, which issue shall represent their deceased parent. Provision for said two thousand pounds sterling and interest is to be made and secured by certain messuages and lots of ground " (which she describes in the will as situated in Boston) which two messuages so charged as security and from which the said sum is to be raised and not otherwise, my executors may sell and dispose of in fee simple or otherwise and vest the proceeds in such funds or securities as they think will most effectually

secure the payment of said two thousand pounds sterling and interest."

"Item. I give and devise to John Innes Clark of Providence, Rhode Island, Esquire, and to John B. Murray, late of Providence, now in Virginia, merchant, my two nephews, the said messuages, &c. incumbered with the payment of the said two thousand pounds and interest, provided for Mrs. Powell and children, in manner and form aforesaid, to hold the same to the said Clark and Murray their heirs and assigns in equal portions incumbered as aforesaid; and when the premises are exonerated therefrom, the same or the residue thereof shall be and remain to the use of the said Clark and Murray their heirs and assigns in equal portions."

Clark and Murray, together with one Edward H. Robbins, were appointed executors, with full power and authority to sell and dispose of the whole or any part of the estate, real or personal, as they, for the better execution of the will, might think proper.

Soon after making the will, the testator died; the will was proved; and Clark and Robbins took upon themselves the office of executors. Clark and Murray also accepted the devise of the real estate in Boston, subject to the charge of the legacy in favor of Mrs. Powell and her children; and from the year one thousand seven hundred and eighty-five to the twenty-seventh day of November, one thousand seven hundred and ninety-one, they paid to Mrs. Powell the lawful interest of the two thousand pounds sterling, which was six per cent. per annum.

By an instrument bearing date the twenty-sixth day of March one thousand seven hundred and ninety-two, purporting to be made between Clark and Murray of the one part and William Dummer Powell and Anne his wife of the other part (wanting the signature and seal of the husband, but executed under the hand and seal of the wife and of the other parties) and reciting the bequest to Mrs. Powell and that, ever since the death of the testatrix, they had paid to her the lawful interest of the two thousand pounds according to the will; and then, in consideration of Clark and Murray's agreeing to pay Mrs. Powell an annuity of four

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hundred dollars, in half-yearly payments, during her natural life and for divers other good causes and considerations, the instrument purported to grant, bargain, assign and set over to Clark and Murray, their heirs, executors, administrators and assigns all and every part of the interest of the two thousand pounds sterling money, with all the right, claim and demand of Mr. and Mrs. Powell to the same during the natural life of Mrs. Powell; with a covenant that Clark and Murray, their heirs, executors, administrators and assigns should, at all times, take and enjoy the annual payment of interest, without any molestation, let or hindrance from Mr. and Mrs. Powell or any persons claiming under them—and declaring that the said annual payment of interest should, at all times during the life of Mrs. Powell, remain and continue unto Clark and Murray and their assigns.

Pursuant to this arrangement and the stipulations contained in this instrument, Clark and Murray, from that time, paid to Mr. and Mrs. Powell the annuity of four hundred dollars, instead of the interest of two thousand pounds sterling, which was equal to five hundred and thirty-three dollars and thirty-three cents, until the year one thousand eight hundred and six, when Clark died. Murray continued the payments until his death, which happened in one thousand eight hundred and twenty-eight.

In the year one thousand seven hundred and ninety-four, they had sold the property devised to them, subject to the charge; and realized from the sales a sum exceeding two thousand pounds sterling.

In order to secure the sum of two thousand pounds sterling, by way of an investment, so as to produce the annuity of four hundred dollars during the life of Mrs. Powell and the capital at her death to be divided among her children, as directed by the will, they made a loan of money to their co-executor Robbins upon his bond and mortgage of certain property situated in Boston, dated the thirty-first day of October, one thousand seven hundred and ninety-four. How much money was loaned was, in the present suit, left in some doubt and uncertainty: but the bond and mortgage were conditioned for the payment of four hundred dollars a year in semi-annual payments during the life of Mrs. Powell

and two thousand pounds sterling, equal to two thousand six hundred and sixty-six dollars, thirteen shillings and four pence lawful money of Massachusetts, at her death.

The mortgage remained in the hands of Murray, after Clark's death, until one thousand eight hundred and nineteen, when the then owners of the property, upon which it was a lien, proposed to pay it off to Murray, provided he would secure to them, by his bond, the payment of one hundred and thirty-three dollars and thirty-three cents a year during the life of Mrs. Powell—being the difference of interest between what the money was worth to them, namely, six per cent., and the four and an half per cent. or four hundred dollars a year payable through the mortgage for the same length of time. Murray acceded to this; received the money; discharged the mortgage; and gave to the persons in Boston his bond for the payment of the one hundred and thirty-three dollars and thirty-three cents annually—and which he and his representatives had ever since paid and continued to pay, the bond being still in force against them.

The principal sum of two thousand pounds sterling or eight thousand eight hundred and eighty-eight dollars and eighty-eight cents was thus received by Murray; and came into the hands of his administrators.


The bill was filed in this cause in the year one thousand eight hundred and thirty by and in behalf of Mrs. Powell and her children against the personal representatives and heirs at law of Murray. The personal representatives of Clark's estate had also been brought in as defendants.

The object of the bill, so far as Mrs. Powell was concerned, was to set aside the deed of the twenty-sixth day of March one thousand seven hundred and ninety-two; and to have an account of the arrears of interest of two thousand pounds sterling, being the difference between what was directed by the will to be paid to her and the four hundred dollars which she had received. And as regarded her children, who were also complainants, the bill also sought to have the principal set apart and secured for their ultimate benefit.

The claim was made, on the part of Mrs. Powell, in

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opposition to the deed, on several grounds—such as its not being founded upon any valuable or meritorious consideration and, therefore, not binding upon her—that it was defective in its execution, her husband being named as a party and not having signed it—that it was obtained from her in violation of her rights under the will and in breach of the duty of Murray and Clark as executors and trustees—that they had derived a profit and pecuniary advantage from the arrangement which they could have no right to retain—and to obviate any difficulty arising from lapse of time and a supposed acquiescence on the part of Mrs. Powell and her husband since the year one thousand seven hundred and ninety-two, it was contended that they remained ignorant of facts upon which she had now a right to seek redress.

As early as the year one thousand seven hundred and eighty-nine, it appeared to have been a subject of discussion between the executors and Mr. Powell, whether the provision made by the will for his wife was liable to abatement as a legacy, provided the nett rents or income of the property, after repairs and incidental expenses deducted, should not be equal to the lawful interest of two thousand pounds sterling. There appeared to have been some apprehension that the income would not be sufficient; and this gave rise to the question, whether repairs, &c. were not to be paid out of the general funds of the estate, instead of suffering the provision made for her by the will to be diminished. She, nevertheless, continued to receive the full amount down to the month of November one thousand seven hundred and ninety-one.

After this, the property requiring considerable repairs, it appeared to have been deemed uncertain how far the nett rents would go towards satisfying her demands. Clark and Murray held out the idea that the amount she might thereafter receive would be fluctuating; and, under these circumstances, the proposition was made to allow her a sum certain, by way of life annuity, to be regularly paid by them instead of leaving her dependent upon the rents and income of the property and, (as was presumed, with a view of avoiding all difficulty and uncertainty as to the amount,) she was induced to agree to the proposal of their taking the

property to themselves and paying her four hundred dollars a year during her life and securing the whole of the principal sum, according to the will, for the benefit of her children at her death.

By this arrangement she relinquished one fourth part of her own interest. The offer appeared to have been made in good faith and from honest motives; and was deliberately accepted by Mrs. Powell. She was on her way from Canada to England at the time, with her family of children, for the purposes of educating them; and was staying at the house of her brother Mr. Murray, one of the executors and residuary devisees in Virginia. Her husband remained in Canada; and although it did not appear that she took time to consult him by letter or otherwise on the subject, yet it might be inferred that she was already acquainted with his views—and if not, there still were others near her in whom she could confide and whose advice she could ask, viz. her two other brothers George W. Murray and James V. Murray and her relative John R. Wheaton—the former of whom appeared to have taken some part in the transaction and was privy to her executing the deed, a clause subjoined to the instrument being in his handwriting and the two latter subscribing their names as witnesses.

Further facts of the case will be found embraced in the opinion of the court.

Mr. G. Sullivan, for the complainants.

Mr. John Duer and *Mr. John L. Mason*, for the defendants.

THE VICE-CHANCELLOR:—There is no pretence of fraud in the ceremonial or manner of obtaining Mrs. Powell's signature and seal or her having executed the instrument without a knowledge of its contents; and I can perceive no room for imputing intentional fraud to any of the parties.

Nor can the deed be considered a voluntary one and without consideration. A valuable consideration was given in the grant of the annuity as a substitute for what she gave up or parted with. It is true that the one was a fourth less than the other; but the inadequacy is not such as, under the

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circumstances, amounts to evidence of fraud. In the absence of such fraud, the transaction must be allowed to stand, although this lady voluntarily and without an equivalent relinquished a part of what she was strictly entitled to by the will. If the will were now before me for adjudication, I should say she was entitled to the whole of the provision, without abatement; and if the rents or income were insufficient to produce the interest of two thousand pounds sterling a court of equity would compel a sale for the purpose of raising the two thousand pounds and investing it at interest for her benefit.—But, if she chose to forego the right of insisting upon the provision of the will, preferring the certainty of four hundred dollars a year for herself and the full sum of two thousand pounds sterling for her children at her death, rather than have a forced sale of the property, which possibly might not have produced the full amount, it does not follow she shall afterwards be relieved.

A deed perfectly gratuitous and voluntary will not, for that reason, be set aside in equity, when free from fraud and when the party has not thought proper to reserve to himself a power of revocation: *Villers v. Beaumont*, 1 Vern. 100; *Colman v. Sarrel*, 1 Ves. J. 50.

The court cannot suppose that Mrs. Powell was uninformed as to her rights or labouring under any delusion or misconception of what she was entitled to under the will. Her husband, it appears, had previously been appointed judge of the court of King's Bench of Upper Canada; and, a few years afterwards, chief justice—which office he filled for many years. It may be supposed he was competent to form a correct opinion as to what were her rights under the will and how those rights could be enforced. It appears, moreover, that in the year one thousand seven hundred and eighty-nine or about that period he visited Boston; and consulted and employed counsel there to look after and assert her claims, if the executors should refuse to pay. Mrs. Powell was doubtless informed of her husband's opinion of the will and competent to act understandingly on the subject of the proposed arrangement. She was not surprised into it. No undue advantage was taken of her necessities or situation. The letters, containing the propo-

sal, evince no desire or anxiety to have her agree to it unless after she had become perfectly satisfied.

It is not like the case of *Evans v. Llewellyn*, 1 Cox's Ca. 333, and 2 Bro. C. C. 150, where deeds were set aside as being improvidently obtained on the ground of an inadequacy of consideration: the parties being in low circumstances, unapprised of their rights until the very time of the transaction—and then taken by surprise—no opportunity allowed them to consult their friends and none present to give them advice—the transaction hurried through—and although no actual fraud appeared to be intended, those circumstances partook of fraud and the court granted relief. But it is not so here.

With respect to the point of defective execution of the deed, inasmuch as the husband, although named as a party, has never signed it: I think it cannot be successfully urged. The subject matter was the separate property of the wife, in regard to which equity looks upon her as if she were a *feme sole*. Incident to the ownership in her was the power of disposition over it, without the assent or concurrence of her husband: *Fettiplace v. Gorges*, 1 Ves. J. 46, and 3 Bro. C. C. 7; *Sturgis v. Corp*, 13 Ves. 190; *Essex v. Atkins*, 14 lb. 542; and having executed the instrument for herself and had the benefit of it, she cannot, afterwards, be permitted to take advantage of the omission of her husband's signature and seal to cancel her own. Besides, if the husband's concurrence was necessary, there is abundant evidence of a complete recognition of the deed on his part as a valid and subsisting instrument. He subsequently appointed agents to receive the money under it; and in the year one thousand eight hundred and eighteen united with Mrs. Powell in a power appointing Mr. George Gallagher their attorney for the special purpose of receiving the money which was payable by the deed. This one act of the husband's is a sufficient ratification, at least in equity.

But a still stronger ground upon which the court cannot now interfere to set aside the deed and open the transaction is the lapse of time. The parties have acquiesced from one thousand seven hundred and ninety-four to the year one thousand eight hundred and thirty—a period of about thirty-

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six years. There is some evidence of occasional dissatisfaction expressed by Judge Powell in one thousand eight hundred and five and one thousand eight hundred and six and of his threatening or causing a chancery suit to be commenced; but if so, it was abandoned—and in eighteen hundred and nine and the following year it would seem to have been no longer a subject of discontent and he then went on receiving the half-yearly payments of the annuity. No sufficient evidence is given of his inability to prosecute a suit for the purpose of vacating the deed and of restoring Mrs. Powell to her rights under the will. The delay is not accounted for.

In *Gregory v. Gregory*, Cooper's R. 201, a bill was filed to set aside a purchase made by a trustee, upon the ground that the consideration for the conveyance was grossly inadequate—that the plaintiffs were ignorant, at the time, of the value of their interests under the will and were in indigent circumstances and advantage was taken of them. Eighteen years elapsed before filing the bill and upon that ground alone it was dismissed, although the case presented strong equities and the court would have relieved had the transaction been a recent one. The decision of the master of the Rolls was affirmed on appeal: 1 Jac. R. 631.

Laches and neglect are always to be discountenanced in equity. A party must not sleep upon his rights here any more than at law. He must use all reasonable diligence to assert his claim or the court will not help him. This principle is found in a great variety of cases: *Smith v. Clay*, 3 Bro. C. C. 639, n; *Jones v. Tuberville*, 2 Ves. Jr. 11; *Hercy v. Dinwoody*, lb. 87; *Campbell v. Walker*, 5 lb. 678; and it is more particularly applicable to stale demands brought forward and attempted to be supported for the first time after the death of the original party to the transaction.

But it is said that Mr. and Mrs. Powell remained many years ignorant of the facts which have since been discovered and which now show that Murray and Clark acted with a fraudulent design in obtaining the property discharged of the lien of the two thousand pounds, with a view of selling the same and benefitting by an investment of the money and

that they have succeeded in making a large profit for which, as trustees, they are liable to account.

I think, however, they did not stand exactly in the light of trustees. They were residuary devisees of this specific portion of the estate and, together with Robins, were executors of the will. As such devisees, they were entitled to all the benefit of the property over and above the legacy charged upon it; and the relation in which they stood to the property and to Mrs. Powell did not forbid their becoming purchasers of her interest. The objection, on this ground, is not valid; and even if, after they had sold the property and realized a sum exceeding two thousand pounds, they advanced to Robins only fifteen hundred pounds while they took his mortgage for two thousand, with interest at four and an half per cent., so as to produce the annuity of four hundred dollars and, by that means, gained five hundred pounds which they have since had the use of, I do not well perceive how it necessarily follows that Mrs. Powell can claim from them the interest of the five hundred pounds by way of making up the amount which she had agreed to relinquish. I am inclined to think the letter from Murray to Mrs. Powell of September 4th 1826, gives a true account of their placing in Robins' hands fifteen hundred pounds of the money and no more, requiring him to secure and repay the whole sum of two thousand pounds at Mrs. Powell's death with interest in the mean time at four and an half per cent., nominally, but which was, in fact, six per cent. on the sum actually advanced. They may have found him willing to take the money on those terms; and it can hardly be supposed they would have been willing to lend the whole two thousand pounds sterling at an interest so far below the legal rate as the face of the mortgage shows. The oppressive nature of the bargain with Robins, if it was such, is not evidence of any fraudulent design, on their part, towards Mrs. Powell in their previous arrangement with her. Whether there were any statute at that time in force in Massachusetts against usury, which would have jeopardized the loan to Robins or avoided the security, does not appear; but if so, they, as executors, must have answered for the

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principal sum of two thousand pounds sterling in their own persons and estate.

The knowledge or concealment of the circumstances of that transaction appears to me not to vary, in any respect, the rights of the parties. Whether it was for the first time made known by the letter of Murray to Mrs. Powell in the year one thousand eight hundred and twenty-six or was verbally communicated in the conversation alluded to in the same letter in one thousand eight hundred and sixteen seems not very material. I consider the effect of the delay or lapse of time upon the claim set up in opposition to the deed is not obviated by any thing appearing in the case and, consequently, that Mrs. Powell is not entitled to an account of any arrears of interest on the two thousand pounds sterling, being the difference between that and the annuity which has been paid to her.

However, the bill is not to be dismissed. It is conceded that the money remains in the estate of Mr. Murray, not set apart or invested in any specific securities; and it is right and proper it should be securely invested so as to produce Mrs. Powell's annuity in future and, at her death, the capital to be divided and paid over to her children and the surplus income, if any in the mean time, to go to the representatives of Murray towards satisfying the outstanding bond in Boston against his estate.

A decree may be made accordingly; but the complainants are not entitled to costs—neither, under the circumstances, ought they to pay costs to the defendants the Murrays. As to the defendants, the executors of Clark's estate, the bill must be dismissed with costs, although, from the frame of the bill, and the nature of the claim made by it, they were deemed necessary parties. If it had been confined to the investment of the capital, they would have been unnecessary parties; but as the bill sought to recover arrears of interest in which they have failed, the complainants must pay costs to these executors.

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BLEEKER and others v. GRAHAM and another:

If adverse claims arise as to the deposit money received by an auctioneer—one party insisting upon its return and the other on its being paid over—the auctioneer may file a bill of interpleader.

Bills of interpleader are not to be encouraged, where there is any other mode of adjusting conflicting claims with perfect safety to the stakeholder. Still, a party holding a fund in which he has no interest and to which adverse claims are set up, is not bound to stand an action at law under a promise or offer of indemnity. Nor is he obliged to exercise any judgment on the subject of the right between the parties when one threatens or commences a suit and the other forbids payment.

In order to work a forfeiture of a deposit on an auction sale, there must have been an express stipulation to that effect.

Bill of interpleader. The complainants were auctioneers; *Nov. 10th,*
and had been employed by the defendant, John Graham, to *1836.*
sell two lots of ground by auction. The other defendant, *Inter-*
John Scudder, became the purchaser at the sum of two *pleader.*
thousand seven hundred dollars. He paid down, pursuant *Auctioneer.*
to the terms of sale, ten per cent. of the purchase money; *Deposit.*
and the residue was to be forthcoming (at a specified time)
on the delivery of the deed. The complainants gave to
Scudder a written receipt for the ten per cent., which was
therein called a deposit; and in the body of this receipt
was inserted the following: "This deposit will, under no
circumstances, be paid over to either buyer or seller without
their mutual consent and the production of this receipt."
The purchaser was the holder of such receipt.

Some difficulty occurred between the parties about fulfilling the contract at the time specified. The vendor tendered a deed, which the purchaser refused; and both of them demanded the deposit—each offering to indemnify the complainants against the claim of the other and forbidding the money to be paid over. The complainants declined paying over the amount to either without "mutual consent." The defendant, John Graham, claimed the money and com-

1836. commenced an action at law against the complainants. The
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 GRAHAM. answers. The cause came before the court on bill and answers.

Mr. A. L. Mc Donald, for the complainants.

Mr. C. F. Grim, for the defendant, John Scudder.

February 22 1836. Mr. D. Selden, for the defendant, John Graham.

THE VICE-CHANCELLOR :—The first and only question to be disposed of, in this stage of the cause, seems to be this: whether the bill is necessary and properly filed?

An auctioneer, in making a sale, is considered in law the agent of both vendor and purchaser; and hence it is that he becomes a mere depositary or stake-holder of that part of the purchase money which, by the conditions of sale, is required to be paid down. When the contract is completed, it is to be paid over as a part of the purchase money. If the contract falls through without any fault of the purchaser, he is entitled to a return of the money; but, should a dispute arise, as in the present case, and both parties claim adversely to each other—one insisting upon a return and the other upon its being paid over—then the auctioneer, not being able to decide between them nor obliged to take upon himself the risk of a determination, may file a bill to compel them to interplead and adjust the matter between themselves: 1 Sugden on Vend. (9 Ed.) 47, 49.

This doctrine is as applicable to an auctioneer as to any other depositary or stake-holder: *Fairbrother v. Prattent*, Dan. R. 64, S. C. 5 Price, 303.

But bills of interpleader ought not to be encouraged, if there be any other mode by which the rights of conflicting claimants can be adjusted with perfect safety to the stakeholder. In these auction sales the deposit is often small in amount; and I should regret to see a bill of this sort filed every time a dispute arose about completing the contract. Such disputes are not unfrequent, owing to some supposed or real defect of title or misunderstanding of the particulars

of sale. The expense of a bill very soon absorbs a considerable portion, if not the whole, of the fund in controversy. I do not know, however, that the court can avoid entertaining these bills. A party holding a fund in which he has no interest and to which adverse claims are set up, is not bound to stand the action at law even under a promise or covenant of indemnity. For, suppose he takes a bond or covenant for that purpose, still he may be put to the trouble and expense of a suit for his reimbursement and, after all, the security which he has taken may prove unavailing. This is a consequence which can be effectually avoided only by not rendering it obligatory upon him, under any circumstances, to accept a bond or promise of indemnity and take the defence upon himself.

The court of chancery must, therefore, continue to interfere until, by legislative enactment, some cheaper and less complicated remedy is provided: like that which has been adopted by act of parliament, in England, where any person sued at law for money or other thing in his hands, to which he makes no claim himself, but to which adverse claims are made by third persons, may, at once, by an application to the court of law in which he is sued or to any one of its judges at chambers, compel such adverse claimants to interplead and thus obtain exemption from all further participation in their controversy.

It is, nevertheless, contended, on the part of the defendant, John Scudder, that, aside from the circumstance of an offer of indemnity, provided the complainants would return the deposit, there was no necessity for filing the present bill, because the condition upon which they received it was a sufficient protection to them so long as his consent to the payment over of the money was withheld. I am inclined to think that Graham cannot recover in the suit at law without proving Scudder's consent to the payment over, especially if the auctioneers can show that the condition, upon which they received the deposit, expressed as in the receipt, was made known to the vendor at the time and no objection was raised by him on the ground of its not being in conformity with the terms of sale; and I suppose that the form of receipt given in this case is adopted by the auctioneers with

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a view to save themselves from all trouble in relation to the deposit, except merely the trouble of paying over the money or returning it when the parties mutually consent. But be the effect of this clause in the receipt what it may, if the parties get into a controversy and a suit is commenced against the auctioneer by one of them, although it may be very obvious that the plaintiff at law cannot recover, still I am of opinion the complainant here is not bound to wait and take his chance of defending the action. This principle was stated in *Langston v. Boylston*, 2 Ves. Jr. 109, and recognised in *Atkinson v. Manks*, in Error, 1 Cowen, 692, where Mr. Justice Sutherland very clearly explains the nature and object of a bill of interpleader; and lays it down as a rule that a stakeholder is not bound to exercise any judgment on the subject of the right between the parties, where one threatens or commences a suit and the other forbids the paying over of the money. There can be no great hardship upon the party having the right of the case, in adhering to this rule: for when it is ascertained which of them has preferred a false claim, the costs of the bill of interpleader, as well as of the litigation generally, can be imposed upon him.

I must hold the bill to be properly filed; and that the complainants are entitled to costs out of the fund to be taxed.

This being settled, the case must then be put in a train for decision between the defendants.

A suit at law has already been commenced, which is calculated to test the right set up by the defendant, John Graham, to the deposit; and there can be no difficulty in permitting that action to go to a trial, with liberty to Scudder to defend it. I shall order (following substantially the precedent mentioned in the note in Daniell's Reports, 68,) that Graham be at liberty to proceed in the action at law commenced against the present complainants, which the defendant Scudder is to defend in their names; that both of the defendants shall be bound by such verdict as may be rendered therein and allowed to stand by the judges: but judgment is not to be perfected, nor execution issued, until this cause shall be further heard after the said trial

and the *postea* is brought into this court. The defendants or either of them are to be at liberty to examine the present complainants as witnesses on the trial of such action ; and the consideration of the question whether either and which of the defendants shall pay over to the other the amount of the complainants costs to be taken out of the fund in hand, the costs of the action at law and also the defendants costs of this suit and all further directions must be reserved until after the trial of such action at law.

I would, however, suggest, for the consideration of the defendant, John Graham, whether he has not mistaken his course in claiming the deposit and bringing an action to recover the specific money or some part of it, even if he can make it appear that Scudder's refusal to complete his purchase was without just cause and that he, Graham, has been damnified by such refusal. I do not understand by the terms of sale—as set out in the bill now before me and admitted in the answers—that if the purchaser failed to complete the purchase, the deposit should be forfeited and the proprietor be at liberty to re-sell the lots and charge the first purchaser with the deficiency and the expenses.

An express stipulation to that effect appears to me to be necessary in order to give the vendor a right to re-sell on account of the first purchaser and to recover from him any deficiency and charges ; and more especially is such a stipulation or condition necessary in order to work a forfeiture of the deposit : 1 Sugden, 40, 51. Now, the defendant, Graham—as appears from his own answer—instead of pursuing a legal remedy for the purchase money after a tender of the deed or filing a bill in this court for a specific performance by the purchaser, employed the same auctioneers to re-sell the property. Could he do this and, at the same time, retain the former contract of sale in force ? There was nothing expressed in such contract to authorize it. But he did not even wait to try the experiment of a re-sale at auction in order to see whether more or less than the first price would be realized. He sold the lots at private sale, at the same price the first purchaser was to pay ; and if, after this, he is entitled to compensation for his trouble and expense in effecting such re-sale, his remedy, if any,

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1836. must be against Scudder personally for damages and not  
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 MILLS against the auctioneers in respect to the deposit in their
 v. hands. He has not taken care to secure to himself any
 HALLOCK. right to or lien upon the fund by any thing contained in the
 contract : and can the law, then, confer it upon him ?

I throw out this intimation of what my views are on this part of the case for the defendant, Graham, to consider whether it would not be for his interest to submit, at once, to an adjudication of the point, without further litigation and expense ?

MILLS and others v. HALLOCK and another.

Goods were sold at auction on the ninth and twenty-second days of June, on " approved promissory notes ;" and delivered to the purchaser, who (although in good credit at the time) did, on the seventeenth day of July following, make an assignment for the benefit of creditors. The approved notes had not been given and were not applied for until after the assignment. The court decided that, even if there were a custom or usage as to sales for approved paper, the delay of the complainants here was against their recovering possession of the goods and that the delivery was complete.

A custom must be proved by evidence of facts ; by means of witnesses who have had frequent and actual experience of it.

Feb. 18th, The bill, which was filed on the twentieth day of July,
 1836. one thousand eight hundred and thirty-two, originally went
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 Auction sale. against William Pike and Joshua C. Skidmore. It had been  
 Custom. dismissed, as to Pike, by consent ; and Pike died two days  
 Delivery. after the same was filed.

The pleading showed that the complainants, Sylvester H. Mills, Levi A. Mills and Thomas M. Hooker, as auctioneers in the city of New York, and about the ninth and twenty-second days of June, one thousand eight hundred and thirty-two, sold to the said William Pike certain goods, specified in a schedule, to the amount of five hundred and twenty-one dollars and sixty-three cents for an approved promissory note to be given at the delivery of the goods. That, by the usage of trade, where goods are delivered when called for, the property in them remains with the seller until

the notes are given. That the complainants delivered the goods to Pike immediately, but that he had, when afterwards requested, declined giving his note for them; and, shortly after the sale, failed and assigned to the defendants and Joshua C. Skidmore his property, including a great part of the goods for some alleged precedent debts. That the complainants had applied to the assignees to re-deliver or pay for the goods, both of which they had refused to do.

The defendants, Charles Hallock and John Jagger, (assignees of Pike,) in their answer, admitted the purchase by Pike; but declared their ignorance of the terms of sale and value of the goods. They denied the usages of trade as averred in the bill; and submitted to the court that where goods were sold as these were, they became the property of the purchaser and that, in the absence of any special agreement, the seller has no control over them. They averred that Pike was in good circumstances at the time of the purchase; and that more than a month afterwards he failed and, on the seventeenth day of July, one thousand eight hundred and thirty-two, assigned to them certain property—a copy whereof was annexed to their answer. That after they had undertaken to execute the objects of the assignment, the complainants applied to them in relation to the goods and that this was the first they knew of the sale or circumstances and they knew nothing more except from the bill. That they told the complainants they did not consider themselves bound to redeliver the goods. That Pike died insolvent on the twenty-second day of July one thousand eight hundred and thirty-two—never having informed them what became of the goods or their avails and they knew nothing of them, except that, upon an examination of Pike's goods, after copies of the bill were served on them, they found one parcel, worth about fifteen dollars, now in their possession and they believed the rest were sold before Pike's failure and the avails applied to his own use. That the goods assigned would not pay Pike's creditors; and they denied the complainants' right to the goods.

Proofs were entered into; but it is believed that, for the purposes of this report, they will be found sufficiency referred to in the opinion of the court.

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Mr. *Sedgwick*, for the complainants.Mr. *Staples*, for the defendants.

Nov. 14th.

THE VICE-CHANCELLOR:—In the case of *Haggerty v. Palmer*, 6 J. C. R. 437, it was assumed that the delivery of the goods was conditional, from the usage of trade which was said to exist in relation to auction sales in the city of New York where goods were sold for approved endorsed notes and the notes were not given; and it was held that the auctioneer could reclaim the goods or their proceeds in the hands of a voluntary assignee; and in *Keeler v. Field*, 1 Paige's C. R. 312, the delivery was considered to be conditional by the terms of the contract itself until endorsed notes were given and not from any particular usage of trade—the sale there not being one at auction. The circumstances of the last case furnished also a ground of fraud upon which the court could very properly interfere and restore possession of the goods. But, in the present case, there is no ground for imputing fraud to the purchaser or any undue means in obtaining a delivery to him. Nor is there any thing in the terms of sale from which it can be inferred that the auctioneers, the complainants, did not intend to part with the possession and all right to and control over the goods, when they permitted the purchaser, *Pike*, to take them to his own store. He was to give an approved note or notes—not necessarily an endorsed note. They might have been satisfied with his own personal responsibility.—He was in good standing and credit at the time. They did not stipulate absolutely for the security of a third person, an endorser. There is, therefore, less reason in such a case for supposing they did not intend a conditional delivery than in the case of a sale for approved endorsed notes.

Besides, the delay on the part of the complainants in calling for the notes and their not seeking to obtain a return of the property until after they had heard of the purchaser's failure and of his having made an assignment, affords sufficient evidence of their having waived the condition, if any

such were attached to the delivery. One parcel of the goods was sold on the ninth of June and another on the twenty-second of the same month; and it was not until about the middle of July that Pike, the purchaser, failed and made an assignment for the benefit of his creditors—say on the seventeenth of July. He had all this time to make sales of the goods. The complainants knew he bought them to sell again. Did they then expect he would keep them on hand and that they could reclaim them or resume the possession at any length of time when they might choose to call and not receive such note or notes according to contract? In *Furniss v. Hone*, 8 Wend. R. 247, it was intimated that a delay of seven days in sending for the notes would be considered a waiver of the condition.

Even placing the present case on the footing of custom or usage, the delay here has been greater than is generally allowed. One of the witnesses for the complainant, Mr. Austin, says the notes are called for in most cases within ten days. Mr. Hone, another witness, states it to be within a fortnight, while Mr. Cruger, their clerk, from six to eight days. And there is no legal evidence before me that the notes were called for before they heard of the assignment. If they did call for them sooner, certain it is they took no steps to get back the goods; and I think this sufficiently shows it was not a conditional delivery or that the condition was waived.

But as to the point of conditional delivery. This is put upon the footing of a custom or usage of auction sales. The existence of such a custom is denied by the answer. It is a matter of fact put in issue; and proofs have been taken. In the case of *Furniss v. Hone* and the cases there referred to, such usage was either expressly admitted or assumed to exist, because it was not denied. The witnesses before named speak of it as a matter understood that when sales are made at auction for approved promissory notes and the goods are delivered, such delivery is conditional only and not perfect until delivery of the notes and, if the notes are not given, the property of the goods remains in the seller. Whether it is so understood by both parties or only by the seller is not stated. Other witnesses, however,

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who have been in the habit of buying goods at auction say they have never heard of such a custom or usage in the trade nor so understood it. The difficulty about the testimony, on the part of the complainants, is that it amounts to no more than the mere opinion or private understanding of auctioneers.

A custom must be proved by evidence of facts (and not by mere speculative opinions;) by means of witnesses who have had frequent and actual experience of the custom. The testimony of those who speak from report only and not from particular instances within their own knowledge, if receivable at all, is of no weight: 4 Starkie, 452. The witnesses here do not speak of particular instances within their own knowledge, where the right to reclaim goods has been asserted on the ground of such conditional delivery and been acquiesced in by purchasers. There is no evidence of facts. No evidence that the purchasers have had frequent and actual experience of the custom; and without this, I cannot say the custom exists.

Upon these several grounds, I consider the complainants fail in their case. It appears, moreover, from the testimony that very few of the goods sold by the complainants remained in specie and came to the hands of the assignees under the assignment, probably not enough to confer jurisdiction. I do not see how I can act otherwise than dismiss the bill with costs.

LE ROY v. THE GLOBE INSURANCE COMPANY, et al.

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The directors of the G. Insurance Company passed a resolution on the tenth of November, 1836, declaratory of a dividend; and on the thirtieth day of the same month such dividend was carried, on the books of the company, to profit and loss, leaving the capital entire and a further surplus to the credit of the company for profits then earned and not divided. Public notice was given (in the newspapers of the eleventh of November) that this dividend would be paid on and after the first of December. Checks on one of the banks were prepared and filled up with each party's dividend. These checks were all dated the first of December, signed by the president and made payable to the order of the secretary of the company and were placed in the hands of the latter to be endorsed by him and delivered over to the stockholders as they should call. About 4-5ths of these checks had been called for. The great fire rendered the insurance company insolvent and its affairs fell into the hands of receivers under the act. A stockholder, who was entitled to participate in this dividend, came, after the fire, for his check and it was refused him. Question, whether the dividend for him had been so far set apart as to give him a right to it notwithstanding the insolvency of the company and the passing of their affairs into receivers hands or whether it fell back into the general property of the company: *Held*, that the dividend had been severed and the stockholders were entitled to it.

The facts in this case, as they appeared by the pleadings, were briefly these.

The complainant and Catharine A. Newbold, since deceased, as guardians of infants, were stockholders of the Globe Insurance Company. These persons possessed one hundred and ten shares of its capital stock, the par value of each share being fifty dollars. The said company was incorporated for insurance against loss by fire, with a capital of one million of dollars, and conducted its business in the city of New York.

August,  
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*Insurance  
Company.  
Severance  
of dividend  
from capital.*

At a meeting of the directors of the company held on the tenth day of November, one thousand eight hundred and thirty-five, a statement of its affairs, up to the first of December then next, was exhibited by the proper officers and committees of the company, showing a surplus fund, arising from profits then earned and undivided, amounting to seventy-six thousand, four hundred and twenty-nine dollars and sixty-nine cents.

On the exhibition of these statements, the directors, by a resolution passed on the same day, declared a dividend of three and one half per centum on the capital stock of the company, for the six months then last past, to be paid out

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of such surplus profits on and after the first day of December then next. This dividend amounted to thirty-five thousand dollars, which sum, on the thirtieth day of November, one thousand eight hundred and thirty-five, was carried, in the books of the company, to the debit of profit and loss; leaving the capital then entire and a further surplus to the credit of the company, for profits then earned and not divided, amounting to forty-one thousand four hundred and twenty-nine dollars and sixty-nine cents. Notice of this dividend and that it would be paid on and after the first day of December was given in the public papers on the eleventh day of November one thousand eight hundred and thirty-five. Checks or drafts on the Merchants Bank were accordingly prepared, such checks being severally filled up for the amount of the dividend payable to each stockholder. These checks were all dated the first day of December, one thousand eight hundred and thirty-five. They were signed by Henry Rankin, President, made payable to the order of Richard Dunn, Secretary of the company, and were placed in the hands of the latter, to be endorsed by him and delivered over to the stockholders, as they should call for them, on their signing receipts for the same in the dividend book. Between the first and seventeenth days of December, about four-fifths, in amount, of these checks, were called for by and were delivered to stockholders and duly paid on presentment at the bank.

Among the checks thus filled up and signed, was one for one hundred and ninety-two dollars and fifty cents, intended to pay the dividend due to the complainant and Mrs. Newbold on their one hundred and ten shares of stock and to be delivered to them.

On the night of the sixteenth of December, one thousand eight hundred and thirty-five, the great fire took place in the city of New York: the complainant and other stockholders, to the amount of about one fifth in value, not having then called for their dividends. On the eighteenth of the same December, the complainant applied for the check payable to him and Mrs. Newbold, to the secretary, who, acting under the orders of the directors, refused to deliver it or otherwise pay the dividend, on the ground that the com-

pany had sustained losses by the fire above mentioned to an amount which had rendered it insolvent. On application to the directors, the same answer was given; and the dividend remained unpaid.

On the twenty-fifth day of January, one thousand eight hundred and thirty-six, the directors declared the company to be insolvent; and three of them, namely, the defendants, Henry Rankin, Isaac Carow and James Heard were (under the act) appointed receivers of its estate and effects. The declaration of insolvency and a certificate of the appointment of the receivers, both under the seal of the company, were filed with the clerk of the court of chancery for the first circuit; on the same day and thereupon the receivers took upon themselves the duties of their office and possessed themselves of all the estate of the company, including the unpaid portion of the said dividend.

At the time of the above mentioned loss, the complainant was insured by the same company to the amount of one thousand four hundred dollars against loss by fire on buildings belonging to him. The insurance was originally made by a policy dated in one thousand eight hundred and twenty-nine, and, afterwards, annually renewed. The last renewal was made on the second day of November one thousand eight hundred and thirty-five for thirteen months and twenty-six days, the premium for which amounted to one hundred and twenty dollars and twenty-nine cents. Soon after the fire, the directors of the company invited the holders of policies, on which the risks were still pending, to cancel them; and the same course was pursued after their appointment by the receivers. In pursuance of this invitation, the complainant consented to cancel his policy, but the receivers, being doubtful of their authority to return any portion of the premium without the direction of some competent court, proposed that the policy should be cancelled, under a reservation of the complainant's right to claim for and receive the unearned portion of the premium. The policy was cancelled accordingly under such reservation.

The bill alleged and the answer admitted that insurance on the same risk could not then be made without the payment of a much higher premium.

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No part of the premium had been refunded, nor had the dividend or any part of it been paid.

The bill, which was filed by the complainant, as well for himself as for other stockholders of the company claiming under the like circumstances, prayed that the rights of such stockholders, in respect to the said dividend and the complainants right in respect to the said premium, might be settled by the decree of the court, and that the receivers, out of the assets of the company in their hands, might be decreed to pay to the complainant and to the other stockholders who should come in and claim the benefit of and contribute to the expenses of this suit, the sums due to them respectively, in respect to the said dividend, and to the complainant so much of the said premium as was unearned at the time of cancelling his policy; and for relief generally.

The answer, admitted the general statements of the bill and alleged that there was no specific appropriation to meet the dividends, but that they were paid out of the general funds or mass of the monies belonging to the company and deposited by them in the Merchant's bank.

The defendants insisted on an equal distribution of all the assets of the company and submitted themselves to the direction and decree of the court.

*Mr. T. L. Ogden*, for the complainant.

As to the right of the complainant and other stockholders, under the same circumstances, to receive the dividend declared on the tenth day of November, and payable on the first of December, one thousand eight hundred and thirty-five: The thirty-five thousand dollars, constituting the dividend, was abstracted and set apart from the general estate of the corporation by the resolution of the directors of the tenth of November, and by the subsequent entry in their books charging this sum to the debit of profit and loss. Each stockholder, by these acts, acquired a vested right in his dividend, for the recovery of which assumpsit would lie in their own several names. The checks, drawn and signed and placed in the hands of the secretary for each stockholder, were a still more distinct appropriation in favor of

such stockholders. They amounted, in equity, to an assignment, *pro tanto*, of the funds in the hands of the bank; and the bank, after notice, would have been liable to the stockholders entitled to the checks. The manner of paying the dividend was a matter of form, which could not affect the substance of the transaction. If, instead of leaving the thirty-five thousand dollars in the Merchants bank to their own credit, the company had caused that sum to be placed to the credit of their secretary, to be paid on his checks, he would then have been the trustee of the stockholders. According to the mode of payment adopted by the company, they were the trustees; and in that character only were possessed of the fund. They ceased to have any beneficial interest in it after its appropriation to the use of the stockholders. It could not, therefore, pass by assignment. Even under the bankrupt laws of England, trust property does not pass to the assignees, on the principle that the assignment passes such property only as the bankrupt was possessed of for his own benefit: *Winch v. King*, 1 T. R. 619. The act of the eighteenth of January, one thousand eight hundred and thirty-six, vests in the receivers all the estate of the corporation; but, like any other assignment, by operation of law, it passes the rights of the corporation precisely as they possessed them: *Brown v. Heathcote*, 1 Atk. 159; *Mitford v. Mitford*, 9 Ves. 86. Even without notice, the receivers would have taken the property subject to whatever equities the corporation were liable to. But, in this case, the receivers were the directors of the company, and took with express notice of the rights of the unpaid stockholders. The principles of the English bankrupt laws, with respect to property in the possession of bankrupts, as reputed owners, would not apply to a case of this kind as between creditors and third persons: *Ex parte Marsh*, 1 Atk. 157. Here, there can be no pretence of complaint on the part of creditors on the ground of any credit given to the company on the faith of the dividend. They looked to the capital of the company, which was preserved entire, with a large surplus, exclusive of the dividend. The dividend of the first of December, one thousand eight hundred and thirty-five, was public and notorious and, so far as cre-

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ditors were concerned, was considered as paid. The receivers, therefore, can be in no situation, with regard to the unpaid position of this dividend, different from that of the company itself. If the stockholders have a legal and equitable claim against the company, they have the same claim against the receivers.

As to the Return of Premium.

Upon the occurrence of the great fire, the different fire insurance companies were understood to have incurred losses to an amount more than sufficient to absorb all their means, to indemnify those whose property was insured and already destroyed. It was essential that the existing assets of the companies should not be subjected to diminution by further casualties; and on this principle of public policy, the act of the eighteenth day of January, one thousand eight hundred and thirty-six, (section nine) authorized the receivers to make new insurances against all outstanding risks and to pay the premiums out of the assets in their hands. (These insurances to be offered to the holders of pending policies on their cancelment. If refused, the new insurance to be held for the benefit of the corporation and the holder of every unexpired policy to stand as a creditor of the company to the amount of the unearned premium at the time it became insolvent.) Upon the equitable principle thus recognized by the Legislature, the receivers invited the complainant to cancel his policy. He consented to do so—to make the new insurance and pay the premium; but, as the receivers were doubtful whether the legal authority to return any portion of premium that “might be unearned on said policy or any policies on which risks were then pending, without the order and direction of some court of competent jurisdiction, they proposed that the right of the complainant to receive and claim any unearned should be reserved.” This was also assented to; and the policy was cancelled by indorsement on said policy or on the books of the company, but nevertheless saving and reserving thereby the complainant’s right to unearned premium.

The right reserved then is that of the complainant to “unearned premium,” which right is now submitted to this court. The equity of the complainant to a return of pre-

mium, in proportion to the unexpired part of the original term of the insurance, is conceived to be undeniable, on general principles. The Company had received from the complainant a valuable consideration for the assumption of a risk, from which the receivers, acting for the benefit of the creditors of the company, desired that it should be relieved. The complainant consented to relieve them; and, by cancelling the contract, to reinstate each party in the antecedent rights. It would be contrary to the plainest principles of justice that the entire benefit of this new contract should be gained by one party and the entire loss sustained by the other. The equity of the complainant to a return of the premium, grounded on the failure of the consideration for which it was paid, is recognized and established by the act of the Legislature. The principle upon which to ascertain the amount of the return, must be considered as the question intended to be reserved on cancelling the policy. And that principle must be, either:—  
1st, according to the rate of premium originally paid—applying it to the unexpired portion of the term insured:—  
or,—2nd, according to the premium actually paid by the complainant for the new insurance. The latter is the principle adopted by the act. It gives indemnity to the complainant and subjects the receivers to no greater expense than they would have been compelled to pay if the insurance had been made in their own names and then assigned to the complainant in pursuance of the course contemplated by the act and for which that actually adopted was a mere substitution.

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*Mr. D. Lord*, on the part of the defendants.

As to the unpaid dividends.

As long as the moneys designed to meet dividends remained at the credit of the Insurance Company in the Bank, or among its monies on hand, it was corporate property. If the bank had failed instead of the insurance company, the loss of the money designed to meet its dividend would not have fallen upon the persons to whom the checks were intended, but would have fallen on the company at large. No doubt can exist that the company at large could have



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appropriated the money upon which the checks were drawn to any other purpose and supplied new funds to meet the dividends; and in all respects, these checks were no more an appropriation of specific monies to a specific person so as to create a trust than an undelivered check drawn by any individual intended to be afterwards applied to pay a debt. While undelivered, the monies remained a part of his general estate, subject to be directed to any other purpose, to become void by any accident or act interfering with the actual delivery. It, therefore, is impossible to conceive how monies, not at the risk of the stockholders as dividend-claimants, they not holding any perfected voucher, moneys not separated except in mere imperfect intention from the corporate property, can be treated as a separate trust specifically traceable. The want of delivery of the checks is an essential and fatal circumstance in the way of such dividend-claimants; and affords, it seems, a decisive answer to the claim for a specific appropriation.

Does the declaring of a dividend create the dividend-claimants creditors entitled to rateable payment in equity with the other creditors? The stockholders of a company are in the character of insurers as to all the property which they have invested or suffered to remain in the common fund. It certainly cannot be contended that, in case of insolvency, the liability of the company is limited to its capital. A corporation is like a natural person, liable, on general principles, to the full extent of all its funds; and the charter, by appointing the capital at a certain sum, neither limits the capacity of the corporation to hold an accretion by way of surplus, nor the liability to pay its debts in full so far as its property will extend. The object of the incorporation is simply to give perpetual succession and to enable the stockholders or joint contributors of capital to avoid responsibility beyond the funds remaining in joint stock within those limits they are mere debtors. And the question now discussed reduces itself to this: can a co-partner withdraw a balance due to him as a creditor of the joint concern, while there are debtors unpaid?

If any answer could be needed to this question in the negative, it could be supported by the considerations, that

the extending of business and policies, to which the insolvency is attributable, was for the benefit exclusively of the stockholders. Every gain by way of chance or accident was for their benefit; every control was in their hands; the existence of the dividends or surplus was their act or neglect:—why should not the consequence be at their loss? Indeed, the absurdity of a contest between stockholders, claiming part of the corporate funds as profits against creditors unpaid by reason of insolvency, is too palpable to admit of greater clearness by argument.

It is true, accident has intervened, which makes a distinction without a difference, between those stockholders who have received dividends and those who have not. But what have the creditors to do with that? It is one of the accidents of life which do not admit of redress upon any principles of law or equity. Similar accidents occur to creditors—one has sustained a loss, the right to receive which has become perfect before the great fire—others sustain loss in the great fire. Could any court interfere to say that one should be paid before the other? Would an undelivered check make any difference? If the older creditor had, by accident, called for his check on the sixteenth day of December, he would have been paid in full. Calling on the seventeenth day of December, he calls as the creditor of an insolvent corporation. As between stockholders claiming upon the corporate funds and receivers of the insolvent corporation *potior est conditio defendentis* even were there *equalis jus*, which there is not.

## II. As to the unearned premiums.

By the laws of the state, in relation to outstanding contingent contracts by insolvent corporations, receivers were authorized to return them *pro rata* on a cancelment of the contract. This was a measure of policy merely to enable receivers to bring these insolvent concerns to a close within some reasonable time. It was not on the ground of failure of consideration. The consideration had not failed. The contract to which it had given rise remained. The insurance company remained liable for future losses. The indemnity would, in any event of loss, have far exceeded the

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premium. It might as well be contended that one who had sold goods for an outstanding note should recover them back on the insolvency of the maker. Under the R. Statutes then, the unearned premiums were returnable at the discretion of the receivers (and this is to be borne in mind *pro rata*) and the insolvency did create a liability for a re-insurance. Then, the act of Jany. 18, 1836, carries the principle of policy still farther, in giving to the receivers the discretion to make re-insurances simply with a view to the possibility of winding up the concerns of the company. They have not done so in this case—they have made no re-insurance—they have had no occasion to do so. It was a discretion which they have not exercised. It was burdensome upon the assets of the company to have it exist and to compel the company, when they had become insolvent, to pay back premiums received, as the price of solvent insurance, when the insured did not give up solvent policies *in return* and it was not by the spirit of that act to be exercised without the necessity of the case and the discretion of the receivers.

Whether, indeed, the holders of policies, situated like the complainants, are entitled to the full rateable unearned premium or a dividend thereon only, seems to be the only question; and that the receivers deem it sufficient simply to submit without argument: having no right in this respect, by concessions, to lessen the funds which they hold for creditors.

Mr. T. L. Ogden, in reply.

I. As to the unpaid dividend.—The bill proceeds on the ground that it was separated from the other property of the company and had ceased to constitute any part of the assets which passed to the receivers.

This separation was effected. 1st. By the resolution of the directors of the tenth day of November, passed in pursuance of a public trust or duty imposed on them by the Act of Incorporation. 2nd. By the entry of the thirtieth of November in which the dividend was placed, to the debit of profit and loss, and thus effectually separated from the

disposable effects of the company. 3rd. By the checks in favor of each stockholder for his portion of the dividend—and finally 4th. By the actual payment and distribution of the dividend on and after the 1st of December among those stockholders who applied for it.

If the resolution of the tenth day of November was, in its nature, revocable prior to the first of December, it then ceased to be so. If executory before, it was then executed. After the first of December and after payment of the dividend, the directors could not have suspended its further payment without a violation of their duty. The Supreme Court would have enforced its payment by mandamus—but, in point of fact, the directors have not attempted to revoke the resolution. The receivers took the property with notice of and subject to the appropriation thereby made, and whether, under the forms pursued by the company, they or their officers holding the checks were the trustees of the stockholders for the payment of the dividend, is immaterial. The fund set apart and appropriated for the purpose belonged, not to the company: but to the stockholders. It has passed into the hands of the receivers, with notice of its appropriation; and they, according to the established doctrine of the court, have thus become the trustees for its distribution.

These obvious principles of equity are not met by the answer, nor by the answering argument on the part of the defendants.

It is said in the argument:—That, because the money remained to the credit of the company, it was corporate property. That the company could have used it for their own purposes, and that, if the bank had failed, the company would have remained liable. These remarks would apply to every case of trust. The question here is, not who held the fund constituting the dividend, but to whom it beneficially belonged.

A trustee having the control of money for the use of another, may use it for purposes beneficial to himself and injurious to his *cestui que trust*, but this power to violate a trust is no argument against the existence of the trust or its due execution. If the trust fund had been lost by the

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failure of the bank or through any cause consistent with the good faith and reasonable care of the trustee, it would present a question dependent on different principles altogether. Thus, supposing the company had paid over the dividend to their secretary and had given notice of that fact to the stockholders or had deposited the money in the bank as a special fund for the benefit of the stockholders, and, having notified them of such disposition of it, the stockholders had neglected to draw the money until the secretary in the one case or the bank in the other had become insolvent, it might well be questioned whether the company would not be discharged. This, however, is a very distinct question from that presented by the pleadings in this case; and it is unnecessary to discuss it.

It is said also: that an incorporated company may acquire funds beyond its capital and is liable to the full extent of its property. This is not denied:—but the question recurs:—what is its property? If dividends, fairly and justly divided and leaving to creditors all and much more than the law required to be left belong, after the dividend, to the stockholders, and not to the company collectively, then, there is nothing in this argument. Again. This case is likened to that of a partnership, in which a co-partner, having an individual balance in the concern, cannot claim it against creditors. The two cases are altogether different. Partners are jointly and severally liable to creditors, to the whole extent of the debts due to the latter. Acts, incorporating companies for insurance and other branches of business connected with the public convenience, are intended to guard individuals from this personal liability; the policy of these acts is to encourage trade by securing to individuals, as well as to the public, the enjoyment of their appropriate privileges and rights. The directors of these corporations are, by the nature of their office, trustees as well for the stockholders as for creditors, and whilst they are bound to maintain inviolate the capital of the company and to apply it faithfully to the payment of its debts, are equally bound to account to the stockholders for the legitimate profits of its business. Whilst, therefore, the power of the court will be exerted to secure to creditors a faithful appli-

cation of the joint property of a corporation, it will be equally exerted to secure to the individual stockholders what, in the shape of earned profits, has been fairly and legitimately separated from the joint property and become vested in such individuals. The argument (on this point) of the defendants counsel would apply to those large profits of the company which remained undivided after the dividend of the first of December, but it has no application to those which were then fairly divided and distinctly appropriated to the stockholders.

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II.—As to the unearned Premium.

The policy of the general Act relative to insolvent corporations (2 R. S. 470, § 75,) like that of the act of 18th January, 1836, was to accelerate the adjustment of the affairs of such corporations and to secure their creditors against contingent liabilities by cancelling the contracts creating them. To encourage and enforce this policy, both acts authorize a return of the full unearned portion of the premium; but the last farther authorises the receivers to make re-insurances, and if, on a tender of the new policy, the holder of the old one refuse to receive it, he is then to stand as a creditor for the unearned premium.

It is said that the authority is discretionary under both acts—be it so: but did not the receivers in this case virtually elect to exercise the authority? They invited the complainant and he agreed to cancel his policy. By cancelling it, the complainant became his own insurer and discharged the company from farther risk. This was precisely tantamount, as regards the company, to a new insurance and assignment. They were relieved from the risk and the complainant assumed it. It is true that the company were relieved, not by means of a new insurance and assignment, but this end was attained by a substituted process, more simple and direct, and, to them, more cheap and beneficial. The substantial object of the receivers being thus attained, they agree that the complainants' right to the unearned premium should be reserved—in other words, to pay back the unearned premium, under the sanction of a

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legal decision, if the complainants' right to a return of it should be thereby established. No mention is made in this reservation of a dividend on unearned premium. That principle of return was applicable only to the case of the complainants' refusal to receive a substituted insurance, which he had not refused but, on the contrary, virtually consented to receive; and so far as concerned the receivers, did receive. The argument of the defendants' counsel seems to suppose that a return of the dividend on the unearned premium would be a more correct rule by which to regulate the cancelling of policies in the case of insolvent insurance companies; and it intimates (without saying) that this rule ought to be applied to this case.

In answer to this speculative remark it may be said, 1st.—That this is not the rule adopted by the legislature. It is not that best calculated to promote the policy of the act, and, therefore, is not that which the court would feel disposed to encourage. 2nd.—That the substantial object of the authority given to the receivers being accomplished by the cancelment of the policy, the return of the whole unearned premium being the only measure of return prescribed or authorised by the act ought (in the absence of any stipulation to the contrary) to be considered as that within the contemplation of the parties. 3rd.—That, by the terms of the agreement, the complainants right to "unearned premium" is the right reserved; and, if this reserved right had reference to a dividend only on such unearned premium or to any other rule of return, that idea ought to have been distinctly expressed.

*December 5.* THE VICE-CHANCELLOR :—This case does not necessarily call for a decision of the question, whether, as between the stockholders of an insolvent insurance company and the creditors, the former are entitled to all the surplus which remained with the company undivided at the time of its disaster over and above the entire capital?

Although there is here such a surplus of upwards of forty-one thousand dollars, besides the dividend, amounting to thirty-five thousand dollars, which was declared on the tenth day of November and made payable on and after the first day of December, yet the complainants, in their bill, only

claim to have their parts or portions of this dividend, which they have not received, now paid over to them out of the funds in the hands of the receivers, instead of leaving the money there to be applied as assets of the company in discharge of its debts.

The complainants assert their right to the money upon the ground of its having become theirs by an express appropriation and setting apart so much out of the company's earnings for the stockholders and thereby distinguished from the general mass of the company's funds; and I am convinced that enough has been done to produce this separation in the view of a court of equity and to confer upon this amount the character of a trust fund which could not afterwards be diverted to other objects.

The investigation of the affairs of the company and the ascertainment of a clear surplus to warrant a dividend—declaring that dividend by a resolution of the board of directors—fixing the period for its payment—giving publicity to it—carrying the amount on the books of the company to the debit of profit and loss—apportioning the same among the stockholders, by filling up and signing checks upon the bank where the funds were deposited for the purpose of being delivered to each stockholder when called for:—these are all acts which the company, by its officers, might lawfully perform. These acts became binding upon the company in its corporate capacity; and gave to the stockholders individually rights which the directors and officers of the company could not afterwards take from them. If, for instance, they had refused, after the first day of December, to deliver out the checks or make payment of the dividends and no insolvency had intervened, it appears to me there would have been no difficulty in the remedy by mandamus in favor of all the stockholders or by action at the suit of individuals from whom the payment was withheld.

Neither, I apprehend, could there be any valid objection to a bill in equity for the purpose of obtaining possession of the checks or the fund in the bank upon which they were drawn, upon the footing of its being a trust fund which the officers of the company were bound to distribute after the first day of December and over which they had no other

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control. That the officers of the company considered the money which was deposited to its credit in the bank appropriated to meet the checks is evidenced by the fact that they went on delivering out checks to such of the stockholders as called for them until the seventeenth of December, when the disastrous fire had occurred; and they would have delivered checks to these complainants in like manner if they had called to receive them. It makes no difference, in my judgment, that the money was not told out and specifically set apart in the bank to meet these checks or that a separate fund was not created for the purpose or that the money intended to meet them still formed a part of the general mass standing to the credit of the company on the books of the bank: for this court can, nevertheless, lay hold of the mass and separate so much as may be necessary to accomplish what was intended and which accident alone prevented at the time. Up to the moment of the prostration of the company, the intention remained, on the part of those who were charged with the management of its affairs, to continue the appropriation and consummate the payment of the dividends which had been nearly completed. It was a matter no longer executory in the view of the parties; and so far as it remained unexecuted this court will now perform it. The intention must be fulfilled; and, for this purpose, a court of equity will consider, not merely the sums which were paid out in dividends, but the whole thirty-five thousand dollars as actually appropriated and set apart for distribution among the stockholders from and after the first day of December and regard it as a trust fund to which the stockholders had acquired vested rights—not in their corporate capacity, but as individuals to whom the money legally and equitably belonged distinct from their other interests in the funds and effects of the company.

Having acquired this right, as between them and the corporation, the assignment or transfer to the receivers could not take it away. The receivers do not stand in the light of purchasers for valuable consideration without notice; and, under such circumstances as exist here, are bound by the trust: *Adair v. Shaw*, 1 Sch. & Lef. 262; *Wood v. Dummer*, 3 Mason's R. 312.

The act of the eighteenth of January, one thousand eight hundred and thirty-six, under which the receivers were appointed, vests in them all the property and effects of the corporation; but, like any other assignment by operation of law, such as in bankruptcy or under our insolvent acts it does not pass trust property—but only such as the bankrupt or insolvent held or was possessed of or entitled to for his own benefit.

The next branch of this case is, as to the return premium claimed by the complainant on cancelling his policy.

I have recently had occasion to examine and pass upon this point, in the case of other receivers and have considered them bound, under similar circumstances, to return such portion of the premium as might be deemed unearned, when they accepted a surrender of the policy before proceeding to make a dividend amongst the creditors generally. I have now only to reiterate that opinion.

By the general act relative to the dissolution of insolvent corporations (2 R. S. 470, § 75,) receivers are authorised to cancel any open and subsisting policy or contract by consent of the party holding it. This has been done in the present case with the complainant and others; and upon its being done, the receivers are authorized to refund such proportion of the premium for the time the policy has to run as the whole premium bears to the whole term of the risk. The object of this provision in the statute is, to enable receivers to settle up the affairs of the company with as little delay as possible and without waiting for the natural termination of outstanding and contingent risks. It may be for the interest of present creditors, as well as stockholders, to bring all such matters to a close in order to have their rights secured against the consequences of contingent liabilities of the company and so that the receivers may know, at once, all the creditors and what is the nett amount of assets to be distributed. This can effectually be done by the course adopted by the receivers; and I think it is the true construction and just meaning of the statute that the premium spoken of to be refunded is to be returned upon the cancelment of the policies. It is, indeed, a condition precedent. The language of the statute is, "and upon such

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amount being paid by such receivers to the person holding or being the legal owner of such engagement, it shall be deemed cancelled and discharged as against such receivers."

Thus, they are first to pay, in order to obtain an effectual cancellation. How, then, can such policy-holder be required to come in as a creditor *pro rata* with general creditors? He is clearly entitled to a priority and preference. The effect would be the same to the creditors, if, instead of procuring outstanding policies to be cancelled upon the terms prescribed, the receivers had caused reinsurances to be made according to the ninth section of the act of the 18th January, 1836. Under this last act, they must pay the premiums for such reinsurance out of the assets of the company. In all probability, this would not have diminished the assets any the less; and the course here pointed out for cancelling policies by substituting others in their place, where the holders consent to receive them or, when such holders refuse, to enable receivers to obtain an indemnity against the loss of the assets which come to their hands by means of such continuing risks and outstanding contracts of the company, appears to me to be founded upon the same principle, namely, that of accelerating the settlement of the affairs of insolvent insurance companies and, necessarily too, at some expense to the funds of such companies. Consequently, the policy-holders who have, by mutual consent or arrangement with the receivers, given up or cancelled their contracts of insurance, are entitled to a return of premium out of the assets as a part of the expense to which such assets are subjected before dividend or distribution among the creditors.

I shall decree that the receivers hand over to the stockholders the amount of the unpaid dividend declared on the tenth day of November and payable on the first of December, one thousand eight hundred and thirty-five; and to the policy-holders, such portion of the premium as remained unearned at the time of cancelling their respective policies. The complainant is likewise entitled to his costs of this suit out of the assets of the company.

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A.

ACCORD AND SATISFACTION.

1. Where notes are taken in satisfaction of a judgment, the debtor giving them must prove affirmatively not only delivery and acceptance, but also an agreement to receive them in payment and to run the risk of their goodness—otherwise he cannot set up a plea of accord and satisfaction. *Chase v. Byrne*, 492.

ACCOUNTS: *See, Stated Accounts, &c.* 1, 2, 3, 7.

ADULTERY.

1. Where a reference is had to a master to report upon the allegations in a bill filed for a divorce on the ground of adultery, the facts of the adultery must be distinctly proved. The mere living together in the same house as man and wife, unaccompanied by proof of cohabitation, is insufficient. A decree for divorce *a vinculo matrimonii* is not to be founded upon conjectures. *Hart v. Hart*, 207.

AFFIDAVIT.

1. Affidavits should contain matters of fact and not matters of argument: the latter will be impertinent. *Powell v. Kane*, 450.

2. The stating a fact affirmatively in a deposition is not to be put down by a negative deposition. Thus, where a party swears to the service of a paper, it is not enough to deny service. *Wyckoff v. Boyd*, 516.

And *See, Practice, Affidavit, &c.*

AGREEMENT.

1. Where a bill sets up one agreement and the answer denies it and sets up another, the bill must be dismissed, with costs; but without pre-

judice to another bill to obtain performance of the agreement admitted in the answer. *Byrne v. Romaine*, 445.

And see, *Personal Service*, 1, 2; *Specific Performance*, 5; *Statute of Frauds*, 1.

ALIENAGE.

1. Form of proceedings upon the application of a father that the legal title of land might be conveyed from his infant children to him, he having purchased while an alien and had the property conveyed into his wife's name and she having died while the property was vested in her, leaving these infant children. *In the matter of Windle*, 585.

ALIMONY.

1. Wife filed a bill for divorce *a mensa et thoro*; and applied for temporary alimony and money to carry on suit. Opposed, on the ground of her habitual drunkenness and having \$2 a week allowed her by the husband. Reference ordered to ascertain whether \$2 a week was enough and whether she could be entrusted with money. *Saunders v. Saunders*, 491.

ANNUITY. See, *Apportionment*, 1; *Interest*, 1.

ANSWER. See, *Pleading, Answer*.

APPORTIONMENT.

1. In general cases of periodical payments becoming due at intervals and not accruing *de die in diem* there can be no apportionment. Annuities, therefore, and dividends from money in the funds are not apportionable. An exception appears in the case of annuities for maintenance of infants and of married women living separate from their husbands. And it does not apply to interest due on bond and mortgage, which may be apportioned, notwithstanding it is expressly made payable at stated periods. *Clapp v. Astor*, 379.

ARBITRATOR. ARBITRATION.

1. The time limited by deed for making an award, may be enlarged by parol. *Bloomer v. Sherman*, 452.

2. The provision in the R. S. declaring that a party shall not revoke the power of arbitrators after a final submission upon hearing, is not to be confined to cases where the award is to be made a rule of court. *Ib.*

3. B. and S., as partners, signed arbitration bonds on the 14th of January; the award was to be made on the 10th February, but on the

day before, the parties in writing—one signing and sealing and the other (B.) signing only—agreed that the time of “rendering” the award be extended to the 19th February; on the 11th February the arbitrators were ready to make their award and on the 18th February it was delivered to the parties. But on the 14th of the same month, B. had served the arbitrators with a revocation and another two days afterwards:—on a bill filed by B. and a plea of the award: Held, that the revocation came too late; and the plea was allowed. *Bloomer v. Sherman*, 452.

And see *Pleading, Plea*, 1, 2.

ASSESSMENT. See, *Contribution*.

ASSETS.

1. Where a person leaves a contract for the sale of lands unperformed at the time of his death and application is made, under the statute, for his infant children to perform it, the purchase money will go as assets and not follow the course of real estate. *In the matter of Everit*, 597.

ASSIGNMENT. See, *Debtor and Creditor*, 5; *Equitable Assignment*.

AUCTION. AUCTIONEER. AUCTION SALES.

1. The English practice of opening biddings upon an offer of a greater price has not been adopted in New-York. Nor will the court order a re-sale merely because the property will sell for more (except, perhaps, where the mortgagee buys for less than the amount of his mortgage and the mortgagor will remain liable for all deficiency on a re-sale. *Woodhull v. Osborne*, 614.

2. Where a stranger purchases at a chancery sale in good faith, something more must appear than a mere offer of a higher price to induce a re-sale. There must be fraud or misconduct of the master or person controlling the sale—or surprise upon the party interested—or his having been misled as to time and place by the purchaser or some person connected with or having the management of the sale. If the party interested be of full age and under no disability, he cannot be permitted to allege his own negligence or inattention as the cause of his surprise or mistake; and a sale cannot be opened if this appears. *Ib.*

3. Unless a decree directs the master to subdivide and sell land in parcels, he is not compelled to do so. *Ib.*

4. If adverse claims arise as to the deposit money received by an auctioneer—one party insisting upon its return and the other upon its

being paid over—the auctioneer may file a bill of interpleader. *Bleeker v. Graham*, 647.

5. In order to work a forfeiture of a deposit on an auction sale, there must have been an express stipulation to that effect. *Ib.*

And see *Sale*; and *Sale and delivery*.

B.

BILL. See *Pleading Bill, &c.*; *Practice, Bill*.

BILL OF DISCOVERY.

1. This court will not uphold a bill of discovery, unless there is a clear necessity for it. If, besides the mere production and disclosure of written instruments, the bill seeks to elicit facts within the personal knowledge of the opposite party and which cannot otherwise be proved, this court will entertain such a bill. *Fitzhugh v. Eearingham*, 605.

BILL OF EXCHANGE.

1. A general bill of exchange has not the effect of an assignment of the money (for which it is drawn) in the hands of the drawee. *Harrison v. Williamson*, 431.

BOND. VOLUNTARY BOND.

1. Neither at law nor in equity can interest, in ordinary cases, be computed upon a bond beyond the amount of the penalty. It cannot, therefore, be allowed where a mortgagee files a bill of foreclosure on a simple mortgage given with a bond confined to the payment of a specified sum and interest; yet, if the mortgagor file a bill to redeem, equity might act upon a different principle and not permit him to do so, unless he paid all the interest due, even though it might exceed the penalty of the bond. *Mower v. Kip*, 165.

2. The penalty in a bond is looked upon as the debt. *Ib.*

3. Voluntary bonds given by a testator will be operative as debts against the estate, unless he was *non compos mentis*, or the bonds were obtained by fraud or undue influence; but they will have to be postponed to bonds and simple contract-debts arising upon valuable consideration. Yet they have a preference of legacies. *Isenhart v. Brown*, 341.

4. Mere secrecy in the manner of giving voluntary bonds is not enough to impeach them. *Ib.*

5. A money bond or annuity bond will not be presumed paid until there is a lapse of twenty years non-payment. Nothing short of this period will do, unless there are special circumstances to aid the presumption. *Clark v. Bogardus*, 387.

6. Chancery will relieve an obligor from a bond upon clear evidence of the acts and declarations of a deceased obligee and where they amount to a relinquishment of intention to exact payment. *Ib.*

And See, *Executor and Administrator*, 3. ; *Principal and Surety*, 1. 2.

BOOKS AND PAPERS, PRODUCTION OF: See, *Production of Documents*, 1. 2.

C.

CESTUI QUE TRUST; See *Trust*, &c.

CHURCH.

1. An injunction obtained by a pew holder, to restrain trustees of a church from pulling it down, dissolved: it appearing that the increase of the congregation and the dilapidated state of the old edifice made it proper. *Heeney v. St. Peter's Church*, 608.

CONDITIONS PRECEDENT AND SUBSEQUENT.

1. Distinction between conditions precedent and subsequent. *Wells v. Smith*, 78.

2. Equity cannot relieve from the consequences of a condition precedent unperformed. But upon the breach of a condition subsequent which would work a forfeiture or divest an estate, a court of equity, acting upon the principle of compensation, will interpose and prevent the forfeiture or divestment, provided it can be given with certainty in damages. *Ib.*

3. S. sold to W. a lot of land. By an agreement under the hands and seals of the parties, W. covenanted to build within a certain time and give a bond and mortgage for a part and pay the balance or give a bond and mortgage for the whole by a specified day; and S. covenanted to give a deed on this day. There was also a clause expressly showing that the agreement was, in all respects, to be void, provided W. failed to perform any one of the covenants. W. entered, but, from untoward circumstances and not from any act on the part of S., was not ready with his money or the bond and mortgage on the day specified in the agreement: but made a tender on the next day: *Held*, to be a condition precedent and that the court could not relieve. *Ib.*

CONDITIONAL SALE.

1. In order to determine whether a transaction amounts to a mortgage or a conditional sale: If the deed or conveyance be accompanied by a condition or matter of defeazance expressed in the deed or even contained in a separate instrument or exist merely in parol (let the consideration for it have been a pre-existing debt or a present advance of money to the grantor) the only enquiry necessary to be made is, whether the relation of debtor and creditor remains and a debt still subsists between the parties? For, if it does, then the conveyance must be regarded as a security for the payment and be treated in all respects as a mortgage. On the other hand, where the debt forming the consideration for the conveyance is extinguished at the time by the express agreement of the parties or the money advanced is not paid by way of loan so as to constitute a debt and liability to repay it, but, by the terms of the agreement, the grantor has the privilege of refunding or not at his election, there it must be deemed purchase money and the transaction will be a sale upon condition, which the grantor will defeat only by a repurchase or performance of the condition on his part within the time limited for the purchase and in this way entitle himself to a re-conveyance of the property. *Robinson v. Cropsey*, 138.

CONTRIBUTION.

1. W. leased lots of land in New-York to C. The latter covenanted to pay taxes, rates, burthens, services, works and impositions, &c. which might be imposed or ordered to be done, &c. W. (the landlord) was owner of a larger adjacent range of lots. An estimate and assessment took place during the term for opening a public square. A part of W's land (not leased) was required for the purpose, while a larger part, including the leased lots, was not wanted. The commissioners, in estimating benefit and advantage, had calculated the lots of W. separately and ascertained the benefit to him, by reason of his interest in the lots not taken above the loss for those taken, at \$3944. The tenant (C's) name did not appear upon the commissioners proceedings or documents. Their report was made up, by the corporation-counsel, in the aggregate of benefit over excess and not in detail agreeably to the commissioners calculations, while the benefit to the premises under lease was assessed by the commissioners in their calculations, with the rest, against W. at \$1265. W. filed a bill against C. for contribution. A general demurrer was interposed; which was overruled and an intimation given that the tenant might be held liable to contribute towards the \$3944., but that the complainant would not be allowed to go out of the commissioners report and consequently might not to go into parol proof, but must rest on the report. *Williams v. Craig*, 297.

COSTS.

1. A counsel in an action at law has no lien, upon the judgment recovered, for his fee in trying the cause; but the attorney has, for his taxable costs. Still, the lien of the latter will not go further than the costs in the identical action. *Phillips v. Stagg*, 108.

2. Parties moving for more than they were entitled to, ordered to pay costs of opposing motion. *North American Coal Company v. Dyett*, 115.

3. A complainant filing a judgment-creditor's bill and failing to discover property, must pay costs on its dismissal. *Raymond v. Redfield*, 198.

4. Where non-resident complainants give security for costs and one of the sureties becomes insolvent, a new one must be added and proceedings stayed until it is done. *Bridges v. Canfield*, 208.

5. Complainant succeeds upon only one of eleven exceptions. He is entitled to costs of drawing this one exception, but neither he nor the defendant has costs of the reference; but the latter has costs upon the exceptions to the master's report and of the hearing, subject to the complainant's costs on the hearing. *Jolly v. Carter*, 209.

6. Bill to be dismissed, if security for costs by non-resident complainants were not given within 30 days: the parties not having complied with a former order for security. *Bridges v. Canfield*, 217.

7. Even though a defendant absconds and thereby the object of a suit is defeated, yet a complainant, upon motion, cannot dismiss his bill without costs. *Palmer v. Van Doren*, 384.

8. If a judgment creditor files a bill against several, and one denies having property, which is not disproved, the bill may have to be dismissed with costs as to him, although it will be retained as to others. *Van Cleef v. Sickles*, 392.

9. Where infant trustees are ordered to convey, they are entitled to their costs. *Reed v. Darrow*, 415.

10. Where a bill sets up one agreement, and the answer denies it and sets up another, the bill must be dismissed, with costs; but without prejudice to another bill to obtain performance of the agreement admitted in the answer. *Byrne v. Romaine*, 445.

11. The solicitor of a party had put impertinent and scandalous matter in his own affidavit used on a motion: He was ordered to pay the costs of referring it and of a hearing upon exceptions taken by him to the master's report. *Powell v. Kane*, 450.

12. Creditors applying to prove their debts against a testator's estate, are to be allowed all costs incident to it out of the fund. *In the matter of Howe*, 484.

13. A defendant who has obtained an order for a non-resident complainant to give security for costs, should move to dismiss the bill where delay arises in giving the security; and not continue, on his part,

by putting in answer and placing the cause on the calendar : for this will be virtually waiving his order for costs and debar him from the motion to dismiss. *Hay v. Power*, 494.

14. While an injunction under a judgment-creditor's bill was upon furniture, it was taken and sold upon a distress for rent. There was no other property. The Court allowed the complainant to dismiss his bill without costs. *Leggett v. Boorum*, 630.

COVENANT.

1. Covenants are to be expounded so as to carry into effect the intention of the parties. Their spirit, as well as letter, is to be observed; and altho' a covenantor performs a covenant according to the letter, yet if he violates the spirit and does any act to defeat its intent or use, he is guilty of a breach of it. *Whitlock v. Duffield*, 366.

And see, *Landlord and Tenant*, 4.

CROSS BILL: See, *Production of Books and Papers*.

CUSTOM.

1. A custom must be proved by evidence of facts : by means of witnesses who have had frequent and actual experience of it. *Mills v. Hallock*, 652.

D.

DAMAGES. See, *Liquidated Damages*.

DEBTOR AND CREDITOR.

1. Although an action is brought by a creditor of a testator against the executors, which proceeds only to a plea, and then the creditor files a bill on behalf of himself and others, to account, and makes the executors and devisees parties, who answer, no valid objection to a decree arises on the ground of the action pending at law : because the executors can be no longer vexed by the latter. *Valentine v. Farrington*, 53.

2. A simple contract creditor may file a bill to have the trusts of a deed of assignment for the benefit of creditors carried into effect. But a creditor who wishes to impeach such a deed, must first obtain a judgment and proceed to the extent of an execution at law. *Lawton v. Levy*, 197.

3. A voluntary settlement upon a wife by a husband can only be impeached by a judgment creditor. *Ib.*

4. If partners dissolve and fraudulently turn the co-partnership property to the payment of private debts, it seems that a simple contract creditor of the partnership may file a bill to restrain them. *Ib.*

5. Debtors made an assignment to trustees for creditors, which contained a clause constructively fraudulent. The trustees reassigned all the property to the assignors, who then made another assignment to the same trustees, which was unobjectionable on its face. A judgment creditor filed a bill some days after this second assignment was executed. The court sustained the latter assignment. *Hone v. Woolsey*, 289.

6. Where a creditor, who issues an execution, becomes the purchaser of his debtor's household effects, and leaves them as a matter of kindness (as alleged) in the possession and to be used by the defendant without hire or reward, and that too for a space of eight years, the same will be considered fraudulent as to other creditors. This might not be so where a third person fairly bought and lent them out of mere kindness to the debtor. *Taylor v. Mills*, 318.

7. A debtor, against whom judgment creditors were pursuing their remedy, allowed to receive for maintenance a part of the funds in the hands of his father's executors, without the consent of creditors—it appearing that the share which such debtor was entitled to under his father's will would be more than sufficient to satisfy all his creditors. *Craig v. Hone*, 376.

8. W. and C. being indebted to L. and H. on notes for goods sold and for money lent, proposed to mortgage all their present and future stock and goods, in case of a renewal and of a further loan; stating their perfect solvency and the great advantage which would accrue to their business by such loan. L. and H. consented; and the mortgage was made out, which assigned all the goods and stock in trade W. and C. then owned or which they might at any time before the final payment of the debt own in whatever store, warehouse or other place the same might be situated: but W. and C. were to keep possession until default. About two months afterwards W. and C. made an assignment to R. of all their goods and stock, in trust for creditors, making R. a preferred creditor; Held, that the mortgage to L. and H. should hold good for so much of the property embraced by the assignment to R. as was in hand or in store at the time the mortgage was given and to such as might have been since purchased and paid for out of its proceeds, but no further; and it was declared that so much of the property and of its avails could be followed. *Levy v. Welsh*, 438.

9. Mode pursued by the master in taking proof of debts where creditors apply for payment out of a fund and children are interested. *In the matter of Howe*, (note a) 484.

10. If a party is arrested by due process of law for a demand claimed to be due and chuses to compromise, by giving his note or bond for the purpose of obtaining his liberty, although, for the want of bail he may be unable to obtain it in any other way, yet such compromise will not be, therefore, set aside nor the security decreed to be delivered up.

There must be fraud or illegality in the proceeding or in obtaining the security. *Farmer v. Walter*, 601.

And see *Costs* generally; *Fraudulent Conveyance*, 3, 4; *Set off*, 6; *Will*, 16.

DECREE.

1. Where executors have accounted under an enrolled decree in a prior suit, the same is conclusive against them so far as it adjudicates upon the rights of complainants in an after suit instituted by them and founded upon such decree. *O'Brien v. Heeney*, 242.

2. In order that a decree may be pleaded as a bar in a second suit, it must bind the party against whom it is pleaded and be conclusive upon his rights or upon the rights of those under whom he claims; and can be no bar against a party or those claiming under him where he is not a party in the first suit. *Griswold v. Jackson*, 491.

And see *Practice, Decree*, &c.

DEED.

1. A deed acquiesced in for thirty-six years will not be set aside. *Powell v. Murray*, 636.

And see *Infant*, 3.

DEMURRER. See *Pleading, Demurrer*; *Practice, Demurrer*.

DEPOSIT. See *Auction, &c.*, 2; *Practice, Deposit*.

DEVASTAVIT.

1. Notwithstanding the R. S., chancery has power to inquire into any alleged *devastavit* by an executor or administrator and to bring all persons before it who may be interested in the question. *Carow v. Mowatt*, 57.

2. A court of equity will no more subject a surety in an administration bond before a *devastavit* is proved, than a court of law. *Ib.*

3. Where an administrator, committing a *devastavit*, is dead, equity will, before action establishing it, take cognizance of a suit against his sureties or their representatives and the persons interested in any estate which he may have left, and make them liable for waste or misapplication of assets. But this would not be done in an ordinary case where the administrator is in full life and within the reach of a court of law or the surrogate's court. *Ib.*

4. A creditor holding a specialty debt due from an intestate and coming against the estate of his administrator, on account of a *devastavit*, can only take equally with such administrator's simple contract creditors; while his sureties must make up the balance. *Ib.*

5. E. M. died intestate and indebted to the complainant's testator

in a money bond. J. E. M. administered on the effects of E. M., gave the usual bond, with sureties, in the surrogate's office; and committed a *devastavit*. J. E. M. died; and a bill was filed by the complainant's testator against the administratrix of J. E. M., one of the sureties and the administratrix of the other sureties, for the purpose of fixing them on the ground of this *devastavit*. The bill was HELD to be, as to parties, well filed; and also, that the complainant would have to come in amongst the simple contract creditors of J. E. M., and the sureties make up the balance. *Ib.*

DISCLAIMER. See, *Pleading, Disclaimer*, 1, 2. Also, *Practice, Disclaimer*.

DISMISSING BILL. See, *Practice, Dismissing Bill*.

DIVIDEND.

1. Where it is agreed that a party shall receive all dividends and profit on stock so long as he remains in a certain employment and he quits before any dividend is made, he cannot have any apportionment of any general dividend afterwards made. Profit does not become dividend until so declared by the directors. *Clapp v. Astor*, 379.

And see, *Insurance, &c.*

DIVORCE. See, *Alimony*, 1.

DOWER.

1. A widow of a partner is entitled to dower out of real estate purchased with partnership funds: but having, in this case, joined her husband in mortgages, she had an equitable right of dower in a moiety only and in its avails. *Smith v. Jackson*, 28.

2. In a suit for dower, proof of actual solemnization of marriage is not necessary. Evidence of cohabitation, general repute, acknowledgment of the parties, reception in the family and other circumstances from which a marriage may be inferred, will be sufficient. *Van Gelder v. Post*, 577.

A woman cannot be deprived of her dower, except by a voluntary act of her own. *Ib.*

3. Where dower cannot be assigned by metes and bounds, it may be held to attach to rents, profits or other produce—and any equitable mode of compensation can be adopted; and the amount is to be regulated by the value at the time of the husband's alienation. *Ib.*

4. The statute of limitations does not bar arrears of dower. *Ib.*

5. Partition at law, where she is not a party and in which she does not join, will not bar a wife's right to dower. *Ib.*

6. Although a divorce, *a mensa et thoro*, be had, yet the wife is entitled to dower out of the husband's lands if she survives him. *Day v. West*, 592.

E.**ELECTION.**

1. Where a party is complainant in equity and defendant (upon the same matter) at law, he cannot be compelled to make his election—it is not as if he were plaintiff in both courts. *Shetzler v. Shetzler*, 584.

EQUITABLE ASSIGNMENT.

In order to constitute an equitable assignment of money by means of an order upon the person in whose hands it may be, the order should direct the payment out of a particular fund; and not generally out of any money to be received. *Phillips v. Stagg*, 108.

ESTOPPEL. See *Partnership*, 10.

EVIDENCE: See, *Witness, Evidence*.

EXAMINER. See *Witness*, 1.

EXCEPTIONS. See *Practice, Exceptions*.

EXECUTOR AND ADMINISTRATOR.

1. Whenever the right of administration devolves upon an infant, the proper course is, to grant administration to his guardian or some other person *durante minore ætate*. If, through mistake or inadvertence, the office has been conferred upon an infant, it may be revoked by the surrogate. *Carow v. Mowatt*, 57.

2. An infant administrator is responsible for all acts done after coming of age and before revocation. A court of equity regards him as a trustee and compels him so far to account: but not with respect to assets which came to his hands during infancy. *Ib.*

3. There is not the same strictness or difficulty in suing here upon administration bonds as at law; nor do the same rules apply. *Ib.*

4. Widow had articles of personalty bequeathed her; and took possession of them, with the knowledge and assent of the executor. He afterwards sued her for the same; but submitted to a nonsuit. In making up his accounts, he charged the fees and expenses paid for the suit, which were allowed by a master, but disallowed by the court. *Isenhardt v. Brown*, 341.

5. Where a public administrator, who is a defendant in a suit, has resigned or is removed from office, the complainant may apply to sub-

stitute the succeeding public administrator and enter an order to that effect and then insert his name in the title of the suit and in the subsequent proceedings; and such last administrator may, if he thinks proper, apply to amend the former proceedings or to file a new answer and open the proofs, &c. *Burras v. Looker*, 499.

And See, *Bond*, 1. 2.; *Debtor and Creditor*, 1.; *Decree*, 1.; *Legacy*, 1, 2, 3, 4, 6.

F.

FEIGNED ISSUE.

1. A feigned issue in divorce cases can only be made up to try the facts distinctly put in issue by the pleadings. General allegations are not regarded. Therefore, where a defendant recriminated generally, but gave neither time, person nor place, the court would not let the issue (applied for by the complainant) go to prove the complainant's conduct—although the defendant, when the issue was asked for, presented an affidavit stating names and declared he had been unable to put them in his answer. *Burr v. Burr*, 448.

FORFEITURE. PENALTY.

1. Although equity will relieve against a penalty or forfeiture introduced for the purpose of security in a case where compensation can be made, yet, when it is not a question of penalty or forfeiture, but of a privilege conferred upon payment of money at a stated period, the privilege is lost if the money be not paid; and the court will not restore it to the party. *Robinson v. Cropsey*, 138.

FRAUDULENT CONVEYANCE.

1. Deeds or instruments brought within the statute against fraudulent conveyances are voidable only as to creditors or purchasers who impeach them and are not absolutely void. And when this is done in equity, the decree of the court is interposed, and, by force of the statute, such decree declares the instrument void *ab initio* as respects those who impeach it and giving to them their legal diligence. But the court does not declare it void as to other persons, nor will it set the same aside as a nullity between the parties to the instrument. *Henriques v. Hone*, 120.

2. In practice, it is usual to direct a release of the right of a party under a deed, which is set aside as constructively fraudulent. But it will not be necessary to direct a release or re-conveyance where a deed is declared an absolute nullity from fraud or imposition in the manner of obtaining it, except under special circumstances and *ex abundanti cautela*. *Ib.*

3. M. made an assignment. Judgment creditors filed bills to set it aside. They succeeded; and a receiver was appointed. The assignees, under the order of the court, conveyed all the trust property and rights of M. to the receiver. Previously to the deed being set aside, one of the assignees had placed some of the trust property with H., an auctioneer, to be sold. The latter supposed the goods to be individual property of the assignee, and sold them in the usual way and rendered an account to the latter. Afterwards the receiver applied to H. for the avails and showed his authority. H. now finding the property had belonged to M. who was a creditor at large of his, in a larger amount than the avails of the sale, insisted upon retaining the money as part satisfaction of his debt: *HELD*, that the receiver was to be considered *de jure*, as well as *de facto*, the assignee of the assignees and not of M. and entitled to the avails and decreed him to pay the same, with interest and costs. *Ib.*

4. Debtors, who were in failing circumstances, assigned their estate to trustees for the benefit of creditors: 1. Upon trust to collect debts, &c.; 2. To pay certain debts in full; 3. Upon trust, to pay, rateably, as far as the proceeds would go, all other creditors who should, within 6 months, agree to release the debtors; 4. Upon trust, out of whatever should remain, to pay, rateably, such creditors as might not, within the 6 months, agree to give such release. And, in case none of the creditors referred to in the third and fourth trusts agreed to give such release within the period limited, then the assignees were to apply the proceeds, which remained after satisfying the trusts firstly and secondly expressed, to the payment, so far as they would extend, of all the creditors rateably. *HELD* to be fraudulent as against creditors. *Mills v. Levy*, 183.

5. M. W. died intestate, leaving real estate mortgaged, and also a widow and two children. The widow administered; and under a claim of her own for maintenance and the mortgage debt of her husband and through the interference of her brother, she got a surrogate's order to sell the real estate, which was bought in by her father: and he, soon after, conveyed it back to her, apparently for about double consideration. No money passed. Under a *fi. fa.* against the widow individually, her right in the real estate was sold by a sheriff and bought and conveyed to C., who devised it to his wife, and died. Upon a bill filed by one of the children of M. W.: *Held*, that the deeds between the widow of M. W. and her father were fraudulent; and that, as notice of fraud or trust was not averred, C.'s deed was void. Also, that the children were entitled to the extent of their original right; that the parties defendants,

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according to the times of possession, were to account for rents and profits; that the dower right of M. W.'s widow passed to C. under the sheriff's deed: and that as C.'s widow had paid off the mortgage which had been given by M. W., she was to be allowed it in account. *Woodruff v. Cook*, 259.

And see, *Debtor and Creditor*, 8.

G.

GIFT INTER VIVOS.

1. Circumstances which constitute a gift *inter vivos* (Sec 1 vol. 294.) again recognized. *Minchin v. Merrill*, 333.

2. *It seems*, that where a debtor is particularly directed by his creditor to convert his debt into a trust fund, by setting the same aside for children, and he does so, (let the same be in the shape of securities, money or bank notes,) a trust will be created for such children, the debtor be a trustee and his administrator cannot touch the fund as assets. 1b.

3. Mrs. T. directed her son in law M. to sell her house and lot, which he did. She came to reside with him and his family (wife and children.) M. put the avails in his business; and took a partner, but afterwards sold out to him and took his notes. In the meantime Mrs. T. repeatedly declared that the avails of the house and lot were to go to M.'s children and expressed a solicitude as to the same; M. had been heard to admit the same; and when he dissolved partnership he left his partner's notes (for which he had sold out) in the hands of a friend, acknowledging they were for the children, and went to the south and there died. His administrator got possession of them: But the court decreed them to belong to the children. Costs to all parties out of the fund. 1b.

GUARDIAN.

1. A father only can appoint a testamentary guardian of his children. *Hoyt v. Hilton*, 202.

And see, *Practice; Guardian, &c.*, 1, 2.

GUARDIAN AD LITEM: See, *Practice; Guardian, Guardian ad litem.*

• **H.**

HUSBAND AND WIFE.

1. A wife, having a power of appointment over personalty in a marriage settlement, may make a deed in favor of her husband, and the court will carry it into effect: provided there has been no compulsion. But, in decreeing, the court will refer it to a master to examine the wife privately, explain her rights to her, and ascertain whether she voluntarily consented and still consents to the deed. *Whitall v. Clark*, 149.

2. Although a husband releases all interest in the wife's trust estate, yet he cannot be a witness for her in relation to it. *Warner v. Dyett*, 407.

3. The rule which excludes the husband and wife from giving evidence for or against each other is inflexible. *Ib.*

4. Although a divorce *a mensa et thoro* be had, yet the wife is entitled to dower out of the husband's lands if she survives him. *Dry v. West*, 582.

5. In a judgment creditor's suit, the defendant showed that years before he had received a sum from his wife's father, in her right, and placed it to her credit upon his books, with the understanding that it was to be her separate property and all furniture purchased with it was to be carried to the account of the fund as her sole property. On an attempt, by the judgment-creditor, to reach the furniture, the wife petitioned to have her equitable rights in it preserved: *Held*, that she was entitled to have it protected as her separate property. *Tugard v. Tulcott*, 628.

6. Where a wife's property (settled upon her) is the subject of a deed, equity looks upon her as a feme sole. Incident to the ownership in her is the power of disposition, without the assent or concurrence of her husband. Such a deed may, therefore, be valid where she has had the benefit of it, even though the husband is made a party and has not signed. She cannot, on this ground, take advantage of it. *Powell v. Murray*, 630.

And see, Pleading, Plea, 3; Voluntary Deed, &c., 1.

I.

INFANT.

1. Where a decree is had in a partition suit wherein an infant (amongst others) has been made a defendant, but no guardian ad litem has been appointed, nor order entered for appearance, nor bill taken as confessed against him, a purchaser under the decree will be discharged from his bid, even though this defendant may have since attained his majority and offers to release his interest: the decree being so far irregular as to be incapable of enrolment. *Kohler v. Kohler*, 69.

2. Infants must file their bills by *prochein ami* and not by guardian. *Hoyt v. Hilton*, 202.

3. Where a deed of property, which ought to have been made by the ancestor and in which infant heirs have an interest, is directed to be executed, their guardian *ad litem* signs for them. And adult parties must execute in their own proper persons. *Van Schuick v. Stuyvesant*, 204.

4. Where creditors apply for payment of their debts out of a fund and children are interested in it, a guardian ad litem will be appointed for them to appear before the master to scrutinize the creditors' claims and protect their rights. *In the matter of Howe*, 484.

5. An infant's deed being voidable only and capable of confirmation, may become confirmed where such infant, after age, makes his will and directs all his just debts to be satisfied. *Merchants Fire Insurance Company v. Grant*, 544.

6. G. an infant, obtained money on mortgage of real estate. He died, having, when of age, made his will and therein directed "all his just debts and funeral expenses to be first paid and satisfied." He also devised the property (without referring to the mortgage) to his mother in fee. The mortgagees filed a bill of foreclosure; when the infancy was set up: but the court decreed in favor of the mortgage, with costs. *Ib.*

Also see, *Assets*, 1.

INFANT ADMINISTRATOR: See, *Executor and Administrator*, 1, 2.

INFANT TRUSTEES: See, *Costs*.

INJUNCTION.

1. While an injunction is in operation, a party ought to respect it, even though improperly issued. *Moat v. Holbein*, 189.

2. A writ of injunction ought to be sufficiently explicit upon its face, by defining the property or matter enjoined, and so that a party may be thereby clearly advertised of what he is not to do. *Ib.*

3. An injunction obtained by a pew holder, to restrain trustees of a church from pulling it down, dissolved: it appearing that the increase of the congregation and the dilapidated state of the old edifice made it proper. *Heeney v. St. Peter's Church*, 608.

4. Although a judgment debtor was advised by counsel that he might collect money previously earned and apply it, together with money in his possession, to purchase family supplies, yet, as it was an infringement of the injunction, an attachment was granted. *Tuggard v. Tulcott*, 628.

Also see, *Partnership*, 8; *Practice, Injunction*, 1, 2.

INSURANCE AND INSURANCE COMPANY.

1. The directors of the G. Insurance Company passed a resolution on the tenth of November, 1336, declaratory of a dividend; and on the thirtieth day of the same month such dividend was carried, on the books of the company, to profit and loss, leaving the capital entire and a further surplus to the credit of the company for profits then earned and not divided. Public notice was given (in the newspapers of the eleventh of November) that this dividend would be paid on and after the first of December. Checks on one of the banks were prepared and filled up with each party's dividend. These checks were all dated the first of December, signed by the president and made payable to the order of the secretary of the company and were placed in the hands of the latter to be endorsed by him and delivered over to the stockholders as they should call. About $\frac{1}{4}$ of these checks had been called for. The great fire rendered the insurance company insolvent and its affairs fell into the hands of receivers under the act. A stockholder, who was entitled to participate in this dividend, came, after the fire, for his check and it was refused him. Question, whether the dividend for him had been so far set apart as to give him a right to it notwithstanding the insolvency of the company and the passing of their affairs into receivers hands or whether it fell back into the general property of the company: *Held*, that the dividend had been severed and the stockholder was entitled to it. *Le Roy v. The Globe Insurance Company*, 657.

Also see, *Set-off*, 8.

INTEREST.

1. Interest not allowed upon arrears of an annuity. *Isenhart v. Brown*, 341.
2. A specific legacy does not carry interest. *Ib.*

Also see, *Bond*, 1.

INTERPLEADER.

1. Bills of interpleader are not to be encouraged, where there is any other mode of adjusting conflicting claims with perfect safety to the stakeholder. Still, a party holding a fund in which he has no interest and to which adverse claims are set up, is not bound to stand an action at law under a promise or offer of indemnity. Nor is he obliged to exercise any judgment on the subject of the right between the parties when one threatens or commences a suit and the other forbids payment. *Bleeker v. Graham*, 647.

Also see, *Auction, &c.*; *Practice, Interpleader*; *Sheriff*.

J.

JOINT PURCHASE. See *Trust, &c.*

JUDGMENT AT LAW.

1. The old statute, relating to the lien of judgments, and the provisions upon the same subject in the Revised Statutes, are substantially the same; and under the old law, a senior judgment loses its lien at the expiration of ten years as to all judgments recovered or mortgages given in the meantime; and after that period it becomes a junior judgment. A revival by *sci. fa.* is of no effect to save it from the operation of the statute; and it creates no new lien, except for the costs of the proceeding. *Mower v. Kip*, 165.

2. Although a judgment be ten years old, yet, as to an assignment for the benefit of creditors made afterwards by the debtor, it retains its priority; the assignee not being a purchaser, nor the assignment an incumbrance within the meaning of the statute. *Ib.*

An old judgment which does not carry interest is not aided in that particular by a *sci. fa.* *Ib.*

4. On a judgment creditor's bill, this court will not go into the validity of the judgment. The court of law wherein it was obtained is the proper tribunal to uphold or set it aside. *Hone v. Woolsey*, 289.

5. Judgment in an action of assumpsit in the Supreme Court against the plaintiff upon the merits. Bill now filed by the party failing, which embraced the same parties, was for the same sum and the same evidence was necessary in each. The judgment had never been reversed; and the defendant set it up in his answer as a bar: Bill dismissed—the judgment being conclusive; but as it was a case of hardship, without costs. *Gregory v. Burrall*, 417.

JURISDICTION.

1. Although the parties to an interpleader suit in this court live in different states, still, the cause will not, before the complainant is dismissed, be removed to a U. S. Court: a complainant in an interpleader bill being more than a nominal party. *Leonard v. Jamison*, 136.

2. The court will not interfere to stay vehicles with heavy loads from passing over a public wooden bridge: but must leave the parties to law. *Thompson v. Mathews*, 212.

3. Although the court interferes to prevent irreparable injury, still it does not do so where damages can be ascertained at law, and compensation can be made in money. *Ib.*

4. This court has concurrent jurisdiction to compel contribution, in regard to a public assessment, as between the owner of the fee and his tenant holding part, who covenants to pay assessments but whose name does not appear on the commissioners report. *Williams v. Craig*, 297.

5. No part of the ancient and well established jurisdiction of the court of Chancery can be destroyed by the assumption or grant of new powers by statute to courts of law; and it cannot be taken away, except by the express enactment of the legislature. *White v. Meday*, 486.

6. Although, by the Revised Statutes, the courts of law can take cognizance and do justice in cases of lost notes, yet the jurisdiction of Chancery in the like cases is not gone or affected. *Ib.*

L.

LACHES.

1. Laches and neglect are always to be discountenanced in equity. A party must not sleep upon his rights here any more than at law. And this principle is more particularly applicable to stale demands brought forward and attempted to be supported for the first time after the death of an original party. *Powell v. Murray*, 636.

LANDLORD AND TENANT.

1. Infant took a lease of a lot of ground in New-York and left the city. The landlord obtained possession under the statute then in force concerning deserted premises. The tenant afterwards returned and filed his bill; but held, he should go to a court of law. *Gorman v. Low*, 324.

2. Held also, that this court could have retained the bill and have given directions for a trial at law and enjoined the parties from setting up temporary bars or impediments, provided the same were against conscience and any such bars or impediments had existed. *Ib.*

Where a lease is made, with covenant of renewal or that the buildings shall be paid for under an appraisal, and such appraisal takes place: the amount of it does not become a lien upon the demised property. *Whitlock v. Duffield*, 366.

4. W. took a lease from D. and others for 20 years at a rent of \$15? 50, with a covenant that lessors would take the buildings at a valuation or grant a new lease for another term of 20 years "upon such terms as the lessors might think proper and as should be approved of by the lessee; and in case the lessee did not approve of the terms, he was to be at liberty to take away the buildings. An appraisal was duly made; D. and others refused to pay the amount and tendered a renewal lease for another 20 years, but put the annual rent at \$6000. W. filed his bill to compel payment of the appraisal or for a new lease at a fair rental. Demurrer interposed. Although the court suggested that the covenant might possibly turn out to be too indefinite, yet as a remedy at law appeared doubtful and the spirit of the covenant required another lease at a just rent, it overruled the demurrer and required the parties to answer. *Ib.*

5. Possession or what is tantamount is necessary to the existence of a lien at law. *Ib.*

6. A landlord's lien, upon the goods of his tenant, is gone immediately they are removed from the demised premises. The statute which allows the former to follow them for a limited period gives no lien. *Reed v. Darrow*, 412.

7. On the 1st of May, D. owed rent to R.; and removed his goods on the 5th May. The landlord, R., issued a distress warrant on the 16th May; but not being able to find the goods, filed a bill for the tenant to discover where they were and obtained a temporary injunction. Demurrer interposed; and bill dismissed, with costs. *Ib.*

LEGACY.

1. A legacy to an executor given for care or pains is not to be regarded in the light of a debt or as founded in contract nor to be governed by the principles applicable to contracts. (And a legatee of this

description must abate equally with other legatees.) *Morris v. Kat*, 175.

2. When a legacy is given to an executor, with the implied condition of performing services, the question generally is whether there has been a sufficient and faithful assumption of the character to entitle the party to it. *Ib.*

3. *It seems*: where an executor is left a bequest for care and pains, he must be prompt to act and any unnecessary delay may be laid hold of by the court to deprive him entirely of the legacy. *Ib.*

4. The court may interpose as to a part of such a legacy. Thus: where a person was made executor and had a legacy left him for his care and trouble in executing the office; and he, at first, declined to serve, whereby the estate was put to the expense of an agent, but afterwards qualified, the master was ordered to deduct from the amount of the legacy such expenses as had been fairly caused by the appointment of the agent. *Ib.*

5. A bill ought not to be filed for a legacy. An application should be made to the Surrogate. *Hoyt v. Hilton*, 202.

6. The produce accruing upon a specific legacy belongs to the legatee; but if the articles be unproductive and detained, no interest can be had out of the estate for the detention; if improperly withheld, the remedy is against the executor only. *Isenhurt v. Brown*, 341.

7. A gift of a legacy to a debtor will not of itself amount to a release of the debt, provided the testator's intention is left doubtful. There must be evidence clearly expressive of the intention—but it may be got at *aliunde*. *Clark v. Bogardus*, 387.

And See, *Interest*, 2; *Will* generally.

LIEN.

1. Where the more personal security of the purchaser has been taken on a sale of land the rule is, as between vendor and purchaser, to sustain the implied lien for the unpaid purchase money; and to consider any bond, note or covenant given by him alone as intended only to countervail the receipt for the purchase money contained in the deed and to show the time and manner in which the payment is to be made—unless there be an express or manifest agreement to waive such lien. And, on the other hand, generally to consider the implied lien as waived, whenever security is taken on the land for the whole or any part of the purchase money or whenever the security of a third person is given. *Shirley v. Sugar Refinery*, 505.

2. The mere taking a promissory note from the purchaser long subsequent to the conveyance will not waive the implied lien; and it rests upon the purchaser to prove it was intended as a waiver. *Ib.*

3. A mortgagee, however, who advances his money without a

knowledge of the way in which the purchaser bought, will gain a priority over the seller's lien. *Ib.*

4. In the present case, the purchasers formed a company and gave their note for part of the consideration, and then became insolvent and conveyed the property to an assignee for the benefit of creditors: *Held* that this assignee stood merely in the place of the late purchasers and that the conveyance to him did not supersede the lien of the seller: *Ib.*

LIQUIDATED DAMAGES.

1. Where several things are stipulated to be done—some of which, if not performed, might lead to much and others to little injury, and one amount of forfeit only, in case of default, is inserted, it will be looked upon as a *penalty*. But where each particular act is connected with a particular specified forfeiture, in such case each neglect will make each forfeiture *liquidated damages*. *Jackson v. Baker*, 471.

2. B. agreed in writing to sell I. a house, which was mortgaged. The bond and mortgage were to be taken up at a specified time. I. was, in the mean time, to have the property insured. For any violation of the agreement or any part thereof the parties mutually agreed to forfeit and pay to each other five thousand dollars as liquidated damages. The purchase was consummated by B.'s giving a deed and receiving from I. the consideration less the amount due on the mortgage; but I. did not take up the bond and mortgage within the time stipulated, although he did not appear to be acting wilfully. B. brought an action; in consequence, to recover the five thousand dollars as liquidated damages. On a bill by I. to restrain the action, the court *HELD* the amount a penalty only and gave B. the liberty of ascertaining his damages through a reference; but intimated (inasmuch as his damages could be nominal only) that further proceedings on his part would be at the peril of costs. If he waived all pretension to damages, a perpetual injunction was to issue and each party was to bear his own costs: *Ib.*

LOST NOTE.

1. Although, by the Revised Statutes, the courts of law can take cognizance and do justice in cases of lost notes, yet the jurisdiction of chancery in the like cases is not gone or affected. *White v. Meday*, 486.

M.

MANAGER AND ACTOR : See, *Personal Service*, 1, 2.

MORTGAGOR. MORTGAGEE.

1. Although courts view with jealousy a mortgagee's acquiring an absolute ownership, yet there is no law against it where the transaction is fair. The law only prohibits a mortgagee from availing himself of a stipulation contained in the mortgage or in a separate instrument made at the time or of some covenant or agreement forming part of the original transaction, and by which he attempts, upon the happening of some event or condition, to render the estate irredeemable. *Remsen v. Ray*, 535.

2. Where a mortgagor or owner of an equity of redemption refuses or neglects to pay taxes due upon the mortgaged premises, the mortgagee may pay them for his own protection and add the amount to his claim ; and if there be a deficiency upon a foreclosure and sale to meet such payment of taxes, the mortgagor is liable for the same upon his bond or covenant. *Eagle Fire Company v. Pell*, 631.

3. And where the mortgagor has sold the mortgaged premises subject to the mortgage and the mortgagees take a bond from the buyer for repayment of money paid by them for taxes, such bond will not, necessarily, bar the mortgagees from their remedy against the original mortgagor on account of such payment : the bond not being of a higher nature than the original bond and mortgage—it is collateral and not substitutional. If the liability of the mortgagor had been discharged, it was for him to show it. *Ib.*

And See, *Conditional Sale*, 1 ; *Infant*, 5, 6.

N.**NE EXEAT.**

1. On an ordinary judgment creditor's bill, where an answer denies property and no proof is had to shew any, a *ne exeat* cannot be had. *Palmer v. Van Doren*, 425.

2. A surety in a bond cannot have a writ of *ne exeat* against the principal as incidental to relief. *Gibbs v. Mermaud*, 483.

3. G. had become surety that M., a captain of a vessel sailing from Turk's Island, would not take any slave away. A slave was found on board his vessel after sailing for New York. G. filed his bill to be protected as surety and for a writ of *ne exeat*. Although the writ issued, it was, on motion, discharged. *Ib.*

NOTICE. See, *Pleading, Notice ; Practice, Noticing Cause.*

P.

PARTIES. See, *Practice, Parties.*

PARTITION.

1. Partition at law, where she is not a party and in which she does not join, will not bar a wife's right to dower. *Van Gelder v. Post*, 577.

PARTNERSHIP.

1. Where parties buy real estate with joint funds for partnership purposes, there is no right of survivorship in the lands. Upon the death of one partner intestate, his share descends to his heir. *Smith v. Jackson*, 28.

2. There are instances, however, of lands held for partnership purposes which will be considered in equity as personalty and be applied accordingly. Thus, it may be agreed by the partners themselves to be so considered ; and this agreement will work the change ; and the same will go as personalty on the death of one partner. But if a purchase be made and a conveyance taken to partners as tenants in common, without any agreement to consider it as stock, although it be paid out of their joint funds and to be used for partnership purposes, it will be deemed real estate. *Ib.*

3. As respects the rights of joint creditors of a firm, it is immaterial whether land assumes the character of real or personal estate in becoming partnership property. In either case, it is liable to the partnership debts. But it will not be considered as partnership property liable to co-partnership debts by the mere taking a deed in the joint name of two persons who are partners. It must be done by some express act or understanding. *Ib.*

4. J. and Mc J. were partners as merchants. They bought in a house and lot upon a mortgage sale, with a view to secure a debt due

their firm; they bought other real estate upon speculation, paying for it out of partnership funds and debiting it to "*merchandize account*"; and they also took up money upon mortgage of the properties, which was put into the same account. They failed in business. Then J. (one of the partners) died, intestate. The surviving partner, Mc. J., conveyed, to trustees, all his rights in the above real estate for the benefit of the creditors of the firm. Foreclosures upon the mortgages executed by the partners had been carried through, and a balance of the funds remained in court; IT WAS HELD, that the real estate was to be considered as co-partnership property and the funds in court liable to partnership purposes. *Ib.*

5. As the rule is well established that the joint property of the partnership must first be applied to the payment of the joint debts, therefore the administrator of J. was not entitled to any part of the funds in court for the benefit of the separate creditors or next of kin. The right to any balance would be in the heir at law of J. *Ib.*

6. Mere dissatisfaction is not enough to authorize the filing of a bill by one partner for the dissolution of a co-partnership. *Henn v. Walsh*, 129.

7. If there be any breach of covenants by one partner which, in its consequences, would be so important as to authorize the party complaining to call for a dissolution before the co-partnership could be dissolved by the efflux of time, the complainant may then have an injunction. *Ib.*

8. And to authorize the appointment of a receiver in a co-partnership suit, it must be such a case as would authorize a decree for a dissolution. Where a dissolution has already taken place or it is apparent that it will be decreed on the ground of some breach of duty or contract, a receiver will be appointed. *Ib.*

9. A receiver will not be appointed merely because partners quarrel. *Ib.*

10. A party who wishes to avail himself, in a present suit, by way of estoppel or otherwise, of any particular fact as having been conclusively established in a former suit between the same parties, must show that the fact he relies upon was absolutely necessary to the finding of the verdict in the previous suit and without the ascertainment of which the verdict could not have been rendered. Hence, a question of co-partnership which came up collaterally in a former action—although passed upon there—was no bar to going into the point of co-partnership in the present suit. *Coutant v. Feeks*, 330.

And See, *Debtor and Creditor*; *Dower*, 1.

PAYING MONEY IN OR OUT OF COURT.

1. It is contrary to the practice of the court to direct the payment of a gross sum by one party to another pending a suit and where there is no sum in court. *Bogert v. Bogert*, 399.

And See, *Vendor and Purchaser*, 10, 11, 12, 13.

PENALTY: See, *Liquidated damages*.

PERSONAL SERVICE.

1. Contracts for personal services are matters for courts of law: and equity will not compel specific performance. *Hamblin v. Dinneford*, 529.

2. An actor agreed in writing with a manager not to perform at any other theatre for a term of years. He broke his engagement; and a bill was filed to restrain him by injunction and to compel performance. *Held*, that it was a mere matter between employer and employed, and the remedy was at law. A preliminary injunction which had been granted was dissolved. *Ib*.

PEW: See, *Church*.

PLEADING.



Answer. Impertinence.

1. A defendant must answer to knowledge and information: knowledge alone will not be sufficient. *Tradesmens' Bank v. Hyatt*, 195.

2. If a defendant does not state facts in matter of avoidance or by way of defence with sufficient particularity to lay the foundation for proofs, the testimony he offers in support of such statement will be rejected and the complainant cannot be prejudiced by the insufficient matter. *Jolly v. Carter*, 209.

3. Where a complainant avers the alienism of parties as a ground for their not being entitled under a will, it is not impertinent in a defendant, executor, to allege in his answer that the complainant (who also claims rights under the same will) is an alien. *Ib*.

4. An executor, in setting forth in his answer the account or inventory of the estate which came to his hands, should not add copies of the appraisers and executor's oaths and of the surrogate's certificate. These may serve as evidences of the correctness of the inventory, but

in pleading, in general, it is not necessary or proper to set forth the evidence on which the defendant means to rely. Such matter will be impertinent in pleading. *Ib.*

5. An executor, who is called to account, is not subject to an exception for scandal and impertinence, for saying in his answer that some of the property is withheld from him by a forged deed possessed by the complainant: for his silence might prejudice him hereafter. *Ib.*

6. Fraud upon the provisions of a law or corrupt swearing, in order to come within the benefit of a statute, is matter which may be enquired of in equity; and, therefore, it is not impertinent and scandalous in an answer to say that fraudulent and corrupt means were pursued by the complainant to procure his naturalization and that, although he had gone through the form of becoming a citizen, yet he was still an alien. *Ib.*

7. Exceptions should not be taken to an answer for insufficiency, unless the discovery required would have some bearing upon the point in controversy. *Fay v. Jewett*, 323.

8. A defendant setting up in his answer that he is a *bona fide* purchaser without notice, must answer all allegations which tend to show his deed to be only colorable and fraudulent. *Wyckoff v. Sniffen*, 581.

9. A defendant may set up matter in his answer which has occurred between the filing the bill and the putting in of such answer. *Lyon v. Brooks*, 110.

10. If a bill be brought to impeach a stated account and it charges that the complainant has no counterpart of the account and prays the same may be set forth, the defendant will be obliged to do so or annex it to his answer or plea, even though he sets up or pleads a stated account. *Bullock v. Boyd*, 293.

11. A defendant is not allowed to file a supplemental answer for the purpose of setting up an important fact which has arisen since the filing of the original answer. He should file a bill in the nature of a supplemental bill. *Taylor v. Titus*, 135.

12. A defendant cannot make his answer a mere demurrer or plea in bar, and thereby avoid answering fully. He may take the same ground of defence in an answer as by a demurrer or plea; but even where he does so (and where no plea or demurrer covers any part) he must answer the whole of the bill. This is a salutary rule and subject to very few exceptions. *Champlin v. Champlin*, 362.

13. In a judgment-creditor's bill against several, the averment must be that the sum due exceeds \$100 over and above just claims of every sort in favor of any and every party against whom the judgment was rendered. An allegation as to the set-off or claims of one of the debtors only will not be sufficient. *Van Cleaf v. Sickles*, 392.

14. A defendant, in answering a judgment creditor's bill, has a right to set up the fact that a writ of error has been brought to reverse the

judgment; as well as circumstances to show that a judgment ought not equitably to have been obtained. *Smith v. Crocheron*, 501.

15. When a bill sets forth a contract in writing, alleging it to be signed by the defendant or his authorized agent, a plea, averring there was no writing subscribed by him or his authorized agent, is inadmissible—such a defence is the province of an answer. *Bailey v. Le Roy*, 514.

See also, *Pleading, Plea*, 1.

Demurrer.

1. If a right to any relief be shown by a bill, a demurrer will be overruled. *Whitlock v. Duffield*, 366.

Disclaimer. See also, *Practice, Disclaimer*.

1. A party who disclaims and shows he has parted with his interest and points out to whom he has disposed of it, need not answer further. *Spoofford v. Manning*, 358.

2. A disclaimer may be sufficient to take away the complainant's right to a further answer, and yet not entitle the party disclaiming to an immediate discharge from the suit. *Ib.*

Interpleader. See, *Interpleader* generally; *Practice, Interpleader*.

Notice.

1. If a party defendant rely upon the want of notice in another from whom he purchased, he must aver the fact in pleading. *Woodruff v. Cook*, 259.

2. Where a title is impeached, a purchaser should fully, positively and precisely aver in pleading the absence or want of notice of fraud or trust, even though it be not charged in the bill; as well as all knowledge of facts charged and from whence notice may be inferred. *Ib.*

Plea.

1. To a bill to set aside an award for corruption, the defendants joined in answering and in pleading the award. The answer preceded the plea and commenced as a general answer, and had no saving as to the plea; nor did the latter appear to be otherwise than a pleading to the whole of the bill: Held, that the plea was bad. *Summers v. Murray*, 205.

2. It is very doubtful how far arbitrators, charged with corruption, can join with parties in pleading the award. *Ib.*

3. A plea in abatement by a *feme covert* defendant is not the proper mode in this court of taking objection to her being sued as a *feme sole*. Therefore, where a judgment had been obtained against a woman as a *feme sole* and a judgment creditor's bill was thereupon filed against her alone, treating her still as a *feme sole*, and a plea in abatement, alleging her coverture, was interposed, such plea was overruled with costs. *Gardner v. Moore*, 313.

And See, *Answer* (under "Pleading,")

POLICE OFFICER.

1. When a felony has been committed, a police officer is justified, without a warrant, in examining the trunks, pocket-book or other articles of personal property possessed by a boarder, upon the suspicions of the keeper of the boarding-house. *City Bank v. Bangs*, 95.

2. Police officers, acting without a warrant, upon the information and at the request of a private citizen, and who are instrumental (through such information) in the recovery of stolen property for which a reward is offered, will not be entitled to the reward merely upon the score of risk assumed or liability incurred in acting without a warrant. *Ib.*

PRACTICE.

Affidavit, Impertinence.

1. Where the court itself directs an affidavit to be referred to a master, who is to report whether there be impertinent or scandalous matter in it, there is no occasion to go into the master's office with exceptions embracing the parts supposed to be impertinent or scandalous. *Powell v. Kane*, 450.

2. The annexing an affidavit to an injunction bill (Rule 37,) where an oath is waived, should be done when the bill is filed. It is not to be sanctioned after answer. *Cooper v. Norwood*, 623.

See also, *Costs*, generally.

Amendment.

1. Defendant, in an adultery case, took three months to put in his answer; and he therein, in general terms, recriminated by charging adultery, but was not specific. Three months afterwards he presented a petition setting forth the names, and stated his inability to give them when he filed his answer, and praying leave to amend in this particular.

It was met by strong affidavits; and the motion was denied: the court considering it had a discretion in such cases. *Burr v. Burr*, 448.

2. In a judgment creditor's bill, an error in the day of obtaining the judgment and issuing a *fi. fa.* allowed to be amended by interlineation (the day originally in the bill was a *Sunday*). *Ayres v. Valentine*, 451.

See also, *Practice, Bill; Amended Bill, &c.*

Answer. Supplemental answer.

1. A defendant is not allowed to file a supplemental answer for the purpose of setting up an important fact which has arisen since the filing of the original answer. He should file a bill in the nature of a supplemental bill. *Taylor v. Titus*, 135.

Attachment.

1. No motion, made after the dissolution of an injunction, improperly issued, for an attachment, on the ground of an infringement of it while in force, can be sustained. *Moat v. Holbein*, 188.

And see, *Injunction 4.; Practice, Service of Pleadings, &c. 3.*

Bill. Amended Bill and Supplemental Bill.

1. Bill filed in relation to a suit at law which had got to judgment. By the time the answer came in, execution had issued and the bail became fixed; and this was mentioned in the answer. But the court could not act upon it under this bill. The complainant should have filed a supplemental bill, asking for such relief as the new state of things would warrant. *Griswold v. Jackson*, 461.

2. A complainant cannot file a supplemental bill to introduce facts which have occurred since the filing of the original bill and upon which a decree can be had without reference to the original bill. The complainant should dismiss his old bill and file an entirely new one. *Milner v. Milner*, 114.

3. Where trustees are changed pending a suit against the trust fund, it is not absolutely necessary to bring them before the court, although the complainants have a right to do so before a decree; and in that

case, supposing the cause to be at issue, it should be done by a supplemental bill. *North American Coal Company v. Dyett*, 115.

4. When there is an alleged discovery of further testimony since the closing of proofs and a sufficient excuse is shown for not making the discovery earlier, the way to get it in is upon a special motion, and not by a supplemental bill. The latter is used to state new matter and not to set forth a mere discovery of further evidence. *Ib.*

5. A supplemental bill may be filed after publication is passed or proofs have been closed, in order to put proper new matter in issue. And if this be done, it will be irregular to examine witnesses to matters already in issue and not proved in the original cause. *Ib.*

6. The signature of counsel ought to appear to a bill on file; and if it be not, the same is ground for a motion to take the bill off the files of the court. *Carey v. Hatch*, 190.

7. If a right to any relief be shown by a bill, a demurrer will be overruled. *Whitlock v. Duffield*, 366.

8. All bills must have the signature of counsel; and the defect cannot be remedied after the pleading has once got on the files, unless under an order of the court. A bill signed by counsel, while it was on the files, ordered to be stricken off. *Purtridge v. Jackson*, 520.

9. Where a bill is amended after appearance, it is necessary to enter a fresh order that the party answer the bill as amended and notice is to be given of the same with a copy of the amended bill. It cannot, in such a case, be taken *p. c.* upon an order to answer entered prior to the amendment. *Jackson v. Edwards*, 582.

And See, *Practice, Affidavit, &c. 2.*; *Production of Documents, 1.*

Contempt. See, *Practice; Service of Pleadings, &c. 3.*

Construction of Rule.

1. The word "*forthwith*" in the 56. rule of the court is to be construed *within 24 hours thereafter*. *Champlin v. Champlin*, 328.

Costs; See "*Costs*" generally.

Decree. Further Directions.

1. Further directions are not given upon motion. They can only be had upon a hearing after a master's report or upon the cause coming on again for the purpose, in pursuance of a former order or decree. The court can then add to the latter, but not so as to materially alter or vary the first decree. *Gardner v. Deriing*, 131.

2. Where a decree in a creditor's suit directed a master to take an account of a testator's personal estate, and the location, quantity and

value of his realty (but did not, in terms, order any reference as to property which might have been converted from real into personal estate since the testator's decease;) and, afterwards, the master was directed to sell the realty and bring the amount into court and at the same time to state such accounts as had not been taken under the first decree: It was held, that he could not go into the inquiry or compel the executrix to account for any timber or wood cut or sold after the death of the testator. *Ib.*

3. In suits for separation, where the complainant proves his or her case, the form of the decretal order settled by Chancellor Kent is to be used. *Pool v. Pool*, 192.

4. No decree where evidence is equal on each side. *Coutant v. Feaks*, 330.

5. The order upon the coming in of the master's report, in a case like the above, is as a final decree and must be enrolled like other decrees. *In the matter of Everit*, 597.

And See, *Infant*, 1.

Deposit.

1. Although a judgment is obtained through a bond and warrant of attorney, yet a complainant, wishing to restrain proceedings under it, must make a deposit or give security under the statute relating to injunctions to stay proceedings in personal actions. *Farrington v. Freeman*, 572.

Disclaimer.

1. Where a defendant disclaims, the complainant may bring the suit to a hearing, and if there were probable cause for making such defendant a party, the complainant may have a decree against him and all claiming under him—and this too (as to such disclaiming party) without costs. *Spofford v. Manning*, 358.

Dismissing Bill.

1. Where a bill sets up one agreement and the answer denies it and sets up another, the bill must be dismissed, with costs; but without prejudice to another bill to obtain performance of the agreement admitted in the answer. *Byrne v. Romaine*, 445.

Examination of Witness. Examiner's Office.

1. Counsel have no right to advise a witness, who is before an examiner, that he is not bound to answer a particular question. *Taylor v. Wood*, 94.

If the witness objects he should demur. *Ib.*

It is the duty of the examiner to inform a witness of his legal rights. *Ib.*

Examining Defendant as a Witness.

1. A complainant cannot examine a sole defendant as a witness against himself; because no decree can be had against a party defendant upon facts to which he is examined as a witness. *Palmer v. Van Doren*, 192.

2. If there be more defendants than one, an examination of a defendant may be had; and you may get a decree against another defendant upon such facts: but you cannot have a decree against the party examined embracing such facts. *Ib.*

3. Where a defendant has been examined, under the usual order as a witness, a complainant may have a decree against him upon other matters to which he was not examined. *Ib.*

Exceptions.

1. Where an answer accompanied a plea and the latter was overruled, the complainant was allowed twenty days to except to the answer. *Summers v. Murray*, 206.

Guardian. Guardian ad litem.

1. Upon an application to appoint a special guardian for selling an infant's real estate, a part owner of the property and who is also a creditor against the infant's share, ought not to be appointed, however responsible and correct his general conduct may be. And if he should be appointed, his acts will be strictly scrutinized by the court. *Matter of Tillotson*, 113.

2. A guardian *ad litem*, executing a deed for an infant, should sign thus: "G. B. W." (the infant) "by J. W. his guardian *ad litem*." In the matter of *Windle*, 589.

Injunction.

1. A complainant who obtains an injunction to restrain a sheriff from paying over the amount of a levy, must make the deposit or give the bond required (by statute) in cases of staying proceedings at law. *Boker v. Curtis*, 111.

2. An injunction is not necessary against new trustees appointed since the commencement of the cause. There is a sufficient notice of *lis pendens*. *North American Coal Company v. Dyett*, 115.

Interpleader.

1. If there be no affidavit, denying collusion, attached to an interpleader bill, it is ground of demurrer. *Shaw v. Chester*, 405.

2. Generally, where a party files an interpleader bill, he must offer and be in readiness to bring the money or thing in dispute into court; and must do so if any injunction is to be granted. *Ib.*

Ne exeat. See "*Ne Exeat*" generally.

Noticing cause.

1. A cause cannot be put upon the calendar by anticipation. Therefore, where a party noticed a cause, upon a certainty of having a report ready by the time it was called, the court set aside a default obtained upon such notice; but, as the defendant did not move in the matter until after the decree was entered, no costs were given. The latter should, before or when the cause was called, have moved to strike it off the calendar. *Miz v. Mackie*, 426.

Order.

1. Form of order upon a judgment creditor's bill taken *pro confesso*. *Stephenson v. Parkins*, 218.

Parties.

1. When surviving assignees in bankruptcy are looked upon as trustees of a fund in their hands, the substituted assignees who are joined with them are so likewise and they should be parties to a suit connected with such a fund, *Denston v. Morris*, 37.

2. E. M. died intestate and indebted to the complainant's testator in a money bond. J. E. M. administered on the effects of E. M.; gave the usual bond, with sureties, in the surrogate's office; and committed a *devastavit*. J. E. M. died; and a bill was filed by the complainant's testator against the administratrix of J. E. M., one of the sureties and the administratrix of the other sureties, for the purpose of fixing them on the ground of this *devastavit*. The bill was *Held* to be, as to parties, well filed. *Carow v. Mowatt*, 57.

3. As a general rule, it is sufficient to bring before the court the first person in being who has a vested estate of inheritance together with those claiming the prior interests and omitting those who may claim in remainder or reversion after such vested estate of inheritance. A decree against the party having that estate of inheritance will bind those in remainder or reversion or who, in any way, come afterwards.

and they have a right of appeal from a decree made against the person having the prior estate. But there must be a clear tenancy in tail to dispense with the necessity of a remainder man being a party to a bill of foreclosure. If there be an express estate for life and it is doubtful whether the same person is also tenant in tail, the remainder man who has the first estate of inheritance ought to be a party. *Eagle Fire Ins. Co. v. Cammet*, 127.

4. M. C. mortgaged real estate; and died, after making his will. He thereby gave all his real and personal estate to his widow until second marriage or death; then to his daughter Mary as long as she lived; and if she had no heirs at her death, then to go to the children of J. C. **Held**, that the daughter Mary had only a life estate; and that on a bill of foreclosure, the children of J. C. ought to have been made parties. *Ib.*

5. Money was left by H. with M. under a parol request to put it out at interest and let it accumulate until the youngest of certain children attained 21, when the same was to be divided amongst the survivors. M., fearing misfortunes in his business, executed his own bond and mortgage to these children. This transaction is not a mere loan of money, but a special deposit for investment and accumulation. Money so deposited remains the property of H. and, subject to her will; and as she afterwards bequeathed all her estate to the said children, with a reservation of the share of a party dying to such one's issue, and some of them died leaving children: *It was held*, that a bill of foreclosure and sale against M. could not be sustained by the personal representatives of the parents who had left issue. *Harrison v. McMenomy*, 251.

6. If an answer to a judgment creditor's bill shows that the persons, not before the court, claim property in the debtor's possession which the creditor attempts to reach, such persons or their representatives must be made parties before a decree can be had. *Taylor v. Mills*, 318.

7. Court can dispense with parties as defendants who are insolvent and where those before the court cannot be benefitted by having them brought in. *Van Cleef v. Sickles*, 392.

8. Where judgment creditors file a bill upon a judgment obtained against several, there will be no necessity for making those of the debtors parties who are insolvent and destitute of property, provided their being so plainly appears upon the bill. *Ib.*

And See, *Executor and Administrator*, 5; *Principal and Surety*, 1. 2.

Paying money out of court.

1. It is contrary to the practice of the court to direct the payment of a gross sum by one party to another pending a suit and where there is no sum in court. *Bogert v. Bogert*, 399.

Receiver's Accounts.

1. A master's report upon a receiver's accounts need not be confirmed and cannot be excepted to. If a party be dissatisfied, he should ask leave of the court to review the principle upon which the accounts are taken so far as the objectionable items are concerned. *Brower v. Brower*, 621.

Rehearing.

1. An omission in a decree of any matter which would have been inserted as a thing of course may be supplied on motion: but nothing more. And if any important error has occurred or any thing material has been omitted, a re-hearing should be asked. *Gardner v. Dering*, 131.

2. An application will not be treated as one for a re-hearing, unless it is apparently so and made in due form and according to the settled practice of the court. *Ib.*

Replication.

1. Upon deciding whether a complainant may be allowed to file a replication after the ordinary time is passed, the court will not look into the pleadings to see what equity the complainant has. It will grant it or not upon the merits of the application merely. *La Roque v. Davis*, 599.

Service of Pleadings and Papers.

1. Although a solicitor appears for different defendants at different times, yet the solicitor for the complainant should, in every case, serve a copy of the bill whenever he serves notice of an order to answer; and should not go upon the idea of the opposite solicitor's requiring only one copy. *Wyckoff v. Boyd*, 516.

2. A right which a solicitor has, for his client, under any rule or practice, can be waived by parol. A solicitor, therefore, who waived his right to a copy of an answer by parol, is bound thereby and cannot afterwards raise the objection of a want of service of a copy. *Ib.*

3. A party in interest, summoned before a master, is not guilty of a contempt for non-attendance, where neither he nor his solicitor has been served with the order upon which the summons is based. *Holcomb v. Jackson*, 620.

PRINCIPAL AND SURETY.

1. Where a party is attempted to be fixed as a principal in a money bond and the defence is that he was a surety only and had required the obligee to sue the other party as principal and such obligee had neglected to do so: this is new matter, and, when put in issue, must be made out distinctly and beyond all reasonable doubt. A full and explicit notice or request from the surety to the creditor, to proceed without delay to collect the amount from the principal debtor, must be proved; and, in order to exonerate the surety, it must also appear that the creditor has improperly refused or neglected to do so, and, by such refusal or neglect, the means of recovering the debt of the principal have been lost by intervening insolvency or from some other cause. *Valentine v. Farrington*, 53.

2. A bill by a bond creditor, upon a joint and several bond, will be sustained against the heirs and devisees of a deceased obligor, although filed before the legal remedy has been exhausted against the surviving obligor. It is only necessary to make the latter a party. *Ib.*

PRODUCTION OF DOCUMENTS.

1. Where a defendant seeks the production of documents or accounts in the complainant's possession, he cannot (unless in the case of requiring them before he can answer and where they are wanted for safe custody) get at them by a motion, but must file a cross bill. Thus, an executor had filed a bill to settle the trusts of a will; B. & wife answered; a replication was filed; and the taking of testimony commenced. B. & wife then applied to have the books and papers left with the examiner for the use of witnesses and counsel. Denied; and the parties were left to a cross-bill. *Bogert v. Bogert*, 399.

2. A party at law, who wants the production of books, accounts or letters to aid him, should (under the statute) apply to the court in which the action is brought. As such court can order the production of them, equity will not entertain a bill of discovery for the purpose. *Fitzhugh v. Everingham*, 605.

See also, *Bill of Discovery*, 1.

PUBLIC ADMINISTRATOR: See *Executor and Administrator*, 5.

Q.**QUANTUM DAMNIFICATUS.**

1. Chancery, having jurisdiction, can, where it is necessary, ascertain the damages of a party by an issue of *quantum damnificatus* or by a reference. *Jackson v. Baker*, 471.

R.**RECEIPT.**

1. Although a receipt, not under seal, is expressed to be in full, and therefore presumptive, in favor of payment in full, yet the presumption may be repelled, explained and contradicted by parol testimony. And where a party claims against the face of such receipt, it is for him to prove his prior demands and 'tis not obligatory upon the holder of the receipt to show previous payment independent of the receipt. *Patterson v. Ackerson*, 427.

RECEIVER.

1. The solicitor for a complainant should not be the solicitor of a receiver in the cause. *Ray v. Macomb*, 165.

2. The court does not appoint a receiver over real estate before the hearing, unless there is evidence of fraud in obtaining possession or special circumstances to show a necessity to preserve the property *pendente lite*. *Willis v. Corlies*, 281.

3. The society of friends hold real estate (meeting-house, &c.) by trustees, never having been incorporated. A schism takes place in the congregation; two parties are formed; and as many trustees belong to one party as to another. One side withdraws, and, claiming to hold the original faith of the society, file a bill for a receiver and to restrain the parties in possession, &c. No charge is made of danger, fraud or irresponsibility. Motion for a receiver, upon the matter of the bill and affidavits in opposition, denied with costs. *Ib.*

And See, *Partnership*, 8, 9.; *Practice, Receiver's Accounts*, 1.
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RE-HEARING.

1. An objection of substance by a defendant can be first raised upon a re-hearing, even though it may prove fatal to the whole bill. *Harrison v. M' Mennomy*, 251.

And See, *Practice, Re-hearing.*

REWARD.

1. A participation in a public reward is not wholly incompatible with the duties of public officers or against the policy of the law. *City Bank v. Bangs*, 95.

2. If a particular house or place is to be searched for stolen goods, a warrant should be obtained designating the place particularly and describing the property in the warrant, in order to justify the officer in making a search provided it should prove fruitless. *Ib.*

3. Still, generally, stolen property may be stopped or taken in any place, either by a private citizen or public officer, without a search-warrant; and it is especially the duty of the officer to do it. *Ib.*

4. When a reward is offered for the recovery of property, it is extended beyond persons who merely act ministerially. The criterion for determining to whom the reward belongs is this: who is the person that has acquired a knowledge of the facts necessary to a detection or discovery of the thing stolen or lost and has imparted such knowledge with the intent and for the purpose of bringing about a recovery or restoration of the property, taking upon himself the risk and consequences of a failure, and acting with a view to the reward, if his suspicions and disclosures are well founded and successful? In such a case, therefore, the mere officer who acts in his duty will not be entitled. It is not like the case of salvage in the marine law. *Ib.*

5. A servant, whose information to a mistress may have given the first cause of suspicion of a robber, will not be entitled to any part of a reward offered for the restoration of stolen property, where such information was not given with an intention of inducing the mistress to act or of the servant's becoming an instrument towards its recovery. *Ib.*

6. The City Bank was robbed. A large reward was offered for the recovery of the property, and a proportionate sum for any part. B, the keeper of a boarding-house, from information given him by his wife, suspected a boarder. B. went to a police officer, stated his suspicions, and wished the latter to go with him. He did, accompanied by

other officers ; none of them had warrants. They were led by B. into his house, who pointed out the trunks of the boarder, he being absent. One of the officers unlocked a trunk and found the stolen money : **HELD**, that B. was entitled to the whole of the reward. *Ib.*

S.

SALE.

1. G. applied to H. and S. in Baltimore to sell him 74 hhds. of molasses on a credit of four months. They declined doing so upon his own credit. He offered to give them a draft upon Mess. H. of N. Y., his consignees. They agreed. G. left Baltimore and went into Virginia. H. and S. wrote to G. saying they were ready to deliver the molasses and considered it at his risk and account. They then commenced shipping it to N. Y. (consigned to Mess. H.) and handed over the bills of lading to G's agents. Another letter showed they were using all their exertions to ship off the whole ; and they forwarded a draft, in blank, on Mess. H., requesting G. to sign and return it. They afterwards wrote for the draft and notified G. of the clearance of all the hogsheads. Not hearing from him, they again wrote for the draft. It appeared that he had become ill in Virginia ; and a friend, at whose house he was, answered their letter at G's request, stating that G. would soon go on to Baltimore and then give the draft. They again wrote, urging to have the draft, saying it was all they at present required. G. died insolvent and without having signed the draft. The consignees, Mess. H., who had got the merchandize insured, were applied to by H. and S., the latter sending a bill of parcels, referring to G's death and asking Mess. H. to honor the amount at the credit of the four months. A creditor in N. Y. had taken out administration upon G.'s effects, and claimed the proceeds arising from the molasses. *Held* that there had been an absolute sale. And the bill of H. and S., which had been filed to repudiate a sale and to have restoration of the molasses or the proceeds thereof, was dismissed with costs. *Harrison v. Williamson*, 430.

SALE AND DELIVERY.

1. Goods were sold at auction on the ninth and twenty-second days of June, on "approved promissory notes ;" and delivered to the purchaser, who (although in good credit at the time) did, on the seventeenth day of July following, make an assignment for the benefit of creditors. The approved notes had not been given and were not ap-

plied for until after the assignment. The court decided that, even if there were a custom or usage as to sales for approved paper, the delay of the complainants here was against their recovering possession of the goods and that the delivery was complete. *Mills v. Hallock*, 652.

SCIRE FACIAS: See, *Judgment at Law*.

SET-OFF.

1. Although a court of law declines to determine a question of set off, yet this is not *res judicata* so as to preclude an inquiry in a court of equity having concurrent jurisdiction. *Hackett v. Connett*, 73.

2. Unliquidated damages, arising from a breach of covenant, give no right of set off at law; and the same rule applies in chancery even since the R. S. *Ib.*

3. Although chancery has sometimes exercised the power of decreeing a set off independent of the statute, it has only done so where there was either an express or implied agreement of stoppage *pro tanto* or mutual credit. *Ib.*

4. There is no such thing as an inherent quality or right of set off in the creation of a debt or demand. It can only arise or attach when there is a mutuality of debts of such a certain and ascertained character as to be capable of set off or of being applied in compensation of each other. *Ib.*

5. C. filed a bill against H. in October, 1829, which was dismissed on the 7th July, 1830, with costs. He filed another bill against H. on the 16th January, 1830, which was also, on the 19th October, 1830, dismissed with costs. In the month of April, 1830, C. had brought an action against H. for a breach of covenant and perfected a judgment therein on the 22nd November, 1830; but, prior to the judgment, he assigned the damages sustained in the action to one A. Upon a bill now filed by H. to have the costs, upon the bills dismissed, set off against the judgment: IT WAS HELD, that the right of set off did not exist, provided the assignment was a valid and unsatisfied one. But H. was allowed the option of a reference to a master upon this point within a given time or to have the bill dismissed with costs. *Ib.*

6. I. gave C. his promissory note, and C. shortly afterwards gave his two notes to I. Prior to any of the notes becoming due, I. became insolvent and made an assignment of his estate, including the two notes, to a trustee for the benefit of creditors. C., in the meantime, had endorsed and passed away I.'s note and when it became due he had to take it up. C. then filed his bill to restrain the trustee from parting with his two notes, and praying that the one he held made by I. the insolvent, might be set off against his own two notes. But the court distinguished this case from *Lindsay v. Jackson* and dismissed the bill. *Chance v. Isaacs*, 348.

7. A judgment for costs will not be off-set against another judg-

ment so as to divest the lien of the attorney for costs, in the first mentioned judgment. The court will protect such lien. *Van Ranst v. Parcels*, 600.

8. Money was borrowed from a Fire Insurance Company, in order to erect a building upon the mortgaged premises. When the building was up, it was insured in the same office by the mortgagors. A fire destroyed it and, at the same time, rendered the Insurance Company insolvent. *Held*, that the loss by fire might be set off against the bond and mortgage. *In the matter of the Globe Insurance Co.*, 625.

And See, *Vendor and Purchaser*, 16.

SHERIFF.

1. Although a sheriff may meet with embarrassment in relation to the ownership of personal property upon which he is required to levy, or in regard to money coming into his hands under process at law, yet he cannot sustain an interpleader bill:—he has sufficient legal protection in such cases. It is possible there may be circumstances to authorize a bill of interpleader by a sheriff—as where he has not been left to pursue the usual legal course with an execution, but, by following the directions of parties in interest, or by their interference, and without there being any fault, omission or neglect on his part, he has been led into embarrassment or difficulty in relation to conflicting claims from which he can relieve himself in no other way. *Shaw v. Chester*, 405.

SPECIFIC PERFORMANCE: See, *Vendor and Purchaser*,

STATED ACCOUNT. SETTLED ACCOUNT.

1. As a general rule, where an account is made up and rendered in due form, he to whom it is rendered is bound to examine the same or to procure some one to examine it for him; and if he admits the account to be correct, it becomes a stated account and is binding upon both parties—the balance being the debt which may be sued for and recovered at law upon the basis of an *insimul. computassent*. So, if instead of an express admission of the correctness of the account, the party receiving it keeps the same by him and makes no objection within a reasonable time, he will be considered, from his silence, as acquiescing and be equally bound by it as a stated account. If either party attempts to impeach the settlement and to open the accounts for re-examination, either wholly or in part—and which can only be done upon the ground of fraud, mistake or error—the burthen of proof rests upon the party impeaching and he must prove the fraud or point out the error or mistake on which he relies. *Philips v. Belden*, 1.

2. The cases allowing enquiry into accounts, where there has been a confidential relationship between the parties, do not extend the doctrine to a settled account between principal and land agent where there

has been an actual accounting, even although there may have been great confidence and trust. *Ib.*

3. Equity gives great effect to the lapse of time and discourages claims not promptly made, especially where there has been no personal disability or other impediment. *Ib.*

4. Where enough appears, in a suit for account, to induce a belief of errors and that accounts require correction, it is the duty of the court to permit it to be done by giving leave to surcharge and falsify. *Ib.*

5. Parties, in being allowed to surcharge and falsify, will be limited to such matters as they have specifically alleged to be overcharges, errors and omissions. *Ib.*

6. Distinction between surcharging and falsifying and accounting generally: Where liberty is given to surcharge and falsify, the court takes the account to be a stated and settled account and establishes it as such. If either party can show an omission, for which an entry of debit or credit ought to be made, such party surcharges, i. e. adds to the account, and if any thing should be inserted which is wrong, he is at liberty to show it, and this is a falsification. The *onus probandi* is always on the party making the surcharge or falsification; and if he fails to prove it, the account must stand as correct. But, in a general accounting, the party producing the account must show the items to be correct. *Ib.*

7. O. and P. were owners of a large landed estate divided into farms. Many years ago they appointed T. B. their general agent to manage the estate and its tenantry and to agree with purchasers and to receive all the money and revenue arising from it. This agency continued to 1791, when A. B. (nephew to T. B.) was appointed sub-agent. In 1806, T. B. died; and A. B. became the general agent. Soon afterwards O. died, but the whole estate descended to P. who continued A. B. as such agent down to 1826. The powers of A. B. as given to him by O. and P. were those of a general agent and steward. O. and P. were in every way competent to scrutinize the accounts of A. B., but still they were averse to the trouble of it and relied entirely upon his integrity and went into no minute examination of them. He received money and acted generally in the agency; and from time to time showed accounts, books of entries, vouchers, and copies of receipts given by him and paid balances as stated to the parties and they gave him receipts and acknowledged the accounts to be settled. **Held**, that this was different from a case of confidential relationship; and, upon a bill filed by P. in 1829, against A. B. for a general accounting, **Decreed** the accounts rendered and signed to be stated and settled accounts. But inasmuch as some particular errors and omissions were expressly charged, the court allowed the parties to surcharge and falsify as to these, but no further. *Ib.*

8. A stated account, which is to be considered as valid between the original parties to it, is also so between one of the parties and a person who guarantees under it. *Bullock v. Boyd*, 293.

9. A defendant may plead or set up in his answer a stated account to a bill for an account generally ; and this will be, *prima facie*, a bar to any further accounting : unless upon a bill charging error or fraud. *Ib.*

10. A party can surcharge and falsify ; but to be allowed this he must charge or show specific error. *Ib.*

See also, *Pleading, Answer.*

STATUTE, generally.

1. Distinction between remedial and penal parts of statutes. *Van Hook v. Whitlock*, 304.

2. Upon every statute made for the redress of any injury, mischief or grievance, an action lies by the party aggrieved, either by the express words of the statute or by implication. This was the doctrine of Ch. Baron Comyn ; and it is here recognized. *Ib.*

3. The injured party only can sue upon a remedial statute. *Ib.*

4. Equity cannot relieve against the provisions of a statute. *Gorman v. Low*, 324.

STATUTE OF FRAUDS.

1. Acts of part performance of a parol agreement for a new lease will not take such agreement out of the statute of frauds, unless they are solely applicable to the parol agreement. Therefore, repairs by a tenant under his old lease to a considerable extent, upon the idea, in his own mind, of getting a new lease, formed no consideration for a promise to give a new lease. *Byrne v. Romaine*, 445.

2. Land was struck off to R. (who, in truth, was one of the sellers,) he let B. take his place, the latter agreeing to give his note for an advance or premium, paying deposit to the auctioneer and receiving the auctioneer's receipt as the buyer. On a bill for specific performance, a plea of the statute of frauds was interposed, but overruled, with liberty however, to R. to set it up in an answer—it being a case of some nicety. *Bailey v. Le Roy*, 514.

———And see, *Trust, Trustee, &c.* 3.

STATUTE OF LIMITATIONS.

1. The statute of limitations or a staleness of demand should be set up by plea or answer and cannot be taken advantage of by demurrer. *Denston v. Morris*, 37.

2. It is a general rule that no advantage can be taken of the statute

of limitations as a bar to a plaintiff's demand, unless the defendant either pleads it or insists upon the same by his answer. But, the like strictness and particularity are not required in an answer as in a plea; although enough ought to be stated to put the facts in issue upon which the benefit of the statute is claimed. *Van Hook v. Whitlock*, 304.

3. Defendants, being desirous of protecting themselves under more than one provision of statutory limitations, set up in their answer that as to all the causes of action of which there was concurrent jurisdiction in courts of law and equity, such causes did not accrue within six years before the filing of the bill and as to all other causes of action, they did not accrue within ten years; and they insisted also upon a lapse of time generally: *Held*, to be sufficient to take advantage of any statute of limitations which might apply. *Ib.*

4. A party was interested in a bond and mortgage. D. gave a power of attorney to B. in 1824., to receive the amount coming to him whenever the mortgage should be paid off and to pay himself monies due and other parties designated and to whom he, (D.) was also indebted: *Held*, that the statute of limitations did not run against the debts and that these creditors were justified in waiting until the mortgage was paid off—nor was payment to be presumed from lapse of time. *In the matter of Oakley*, 478.

5. The statute of limitations does not bar arrears of dower. *Van Gelden v. Post*, 577.

SUBSTITUTED SECURITY.

1. Where a power of attorney is given to pay the debt of another who holds a promissory note, such debt—after lapse of time—will be valid, although the note may not be forthcoming. There has been substituted security. *In the matter of Oakley*, 478.

SURCHARGING AND FALSIFYING. See, *Stated Account*, &c.

4, 5, 6.

SURROGATE.

1. Error of judgment by a surrogate, however palpable, does not render proceedings under it void: and advantage can only be had on appeal. It cannot be passed upon in a collateral suit or action. *Woodruff v. Cook*, 259.

2. A mother's charge for maintaining children after a father's death is not to be construed into a debt which can allow a surrogate to sell the real estate of the latter. *Ib.*

T.

TAXES. See, *Mortgagor* ; *Mortgagee*, 2.

TENANT FOR LIFE.

1. A life estate in a house and lot under mortgage is given by a testator to three persons equally and then to others in fee. *Held*, that the tenants for life must keep down the interest equally out of the rents. That when the life estates fall in, the mortgage remains a charge to be borne by those in fee. The tenants for life are not bound to extinguish it. If the mortgages are called in during the lives of the tenants for life and it should be found expedient to pay the same out of the residuary personalty of the devisees in fee, the latter will stand in the place of the mortgagees so far as to collect the interest payable by the tenants for life. And as in this case the executors had paid off the mortgage, it was also held that the tenants for life must bear the interest which accrued upon it from the testator's death to the time of payment and continue to be charged with interest as if the mortgage remained. *Cogswell v. Cogswell*, 231.

2. Real estate purchased by a testator and devised to tenants for life and to others in fee had not been entirely paid for : *Held*, that the executors must pay the balance like any other debt out of the personal estate ; that the tenants for life could insist upon it ; and that the title would have to be taken to the executors in trust for the purpose of the will. *Ib.*

3. Life-tenants cannot compel executors, in the absence of any direction by the testator, to use the residuary estate in improvements upon vacant lots. They can make leases for their lives and do any thing to benefit themselves which does not amount to waste or is not prejudicial to the inheritance, without requiring the aid of the court. *Ib.*

4. Lots with buildings upon them devised to tenants for life and then to others in fee. After the testator's death, ten feet of the fronts taken off to widen the street, which destroyed the buildings. It was considered desirable to erect new ones. The court *directed* the executors to appropriate a sum out of the residuary personal estate to build them, reserving an interest of 6 per cent. upon the actual cost to be paid out of the rents and a reasonable allowance for the depreciation and repair until the life estates should fall. *Ib.*

5. Although personal property is acquired by a testator after the making of his will, yet it passes under it, provided words sufficiently

comprehensive are used or the context shows he did not intend to be intestate as to any part. *O'Brien v. Heeney*, 242.

6. Where it is clear, from the intention of the testator, that the word *or* is used instead of *and*, and *e converso*, the court interposes to change the word. *Ib.*

7. If it is perceived, after a full hearing, that an effectual decree cannot be made, the cause can be ordered to stand over to add parties. *Ib.*

TENDER.

1. Where a person holds hypothecated property and a tender is made of the amount due upon it and he refuses the tender, he makes the property so far his own as to run the chance of after depreciation and will be obliged to take it in full satisfaction should it prove worthless—and should there have been a surety, the latter then becomes released. *Griswold v. Jackson*, 461.

TRUST. TRUSTEE. CESTUI QUE TRUST.

1. Where a co-trustee mingles the trust funds with his individual monies so as not to be distinguished, and dies, the other trustee (as trustee) cannot file a bill against his administrator to have funds in his hands delivered over; but the surviving trustee must come in *pari passu* with the creditors of the intestate. *Hart v. Bulkley*, 70.

2. A trust is not to fail for want of a trustee or from any other cause, unless it would be inconsistent with public policy or the law of the land. *Stagg v. Beekman*, 89.

3. A trust may result or be implied from a joint advance upon a purchase by two in the name of one. It is not within the statute requiring the trust to be manifested by writing. And the payment of the money after the purchase (by the party claiming the benefit of being a joint purchaser) makes no difference. Plea that the alleged trust was not in writing and that the complainant did not pay part of the purchase money at or before the completion of the purchase, overruled. *Ross v. Hegeman*, 373.

4. A mortgage is made to a church; and a person, interested in the mortgage money, sells his interest in it to a trustee of the church: Such trustee can only charge against the church the amount he paid for it. He must, as to the rest, be considered as having acted for his church. *In the matter of Oakley*, 478.

U. V.

USURY.

1. The statute against usury does not apply where a loan is made to be returned within a certain time or upon a certain event depending upon a casualty which hazards both principal and interest without any right to look to the borrower. *Dowdall v. Lenox*, 267.

2. Where a monied transaction is substantially a loan, upon an understanding that the money or thing is to be returned at all events, the lender cannot lawfully reserve to himself any thing in the shape of interest or profit beyond the amount of legal interest. Nor will any shift or contrivance take the case out of the statute. *Ib.*

3. The test of usury is: whether the substance of the transaction is really a loan of money or the creation of a debt, whatever may have been the form of the contract; and if it be a loan, then whether the lender or payee has stipulated for or secured to himself by means of the loan and arising either from it or from any thing connected with it and forming part of the same transaction, any profit or pecuniary advantage he would not otherwise have been entitled to exceeding the rate of interest allowed by law? *Ib.*

4. N. owed L. \$4500. The former applied on behalf of himself and D. to L. for a loan of \$60,000 to purchase a cargo, and so that the old debt of N. of \$4500 was to be secured by the same bond and in the same way whereby the \$60,000 was to be secured. In fact, a bond was given by N. and D., with a surety, for \$64,500 and interest, and L. also held the return cargo (as had been agreed) for better security. *Held*, that the adding of N.'s old indebtedness of \$4500 to the \$60,000 borrowed by N. and D. did not make the matter usurious either as between N. and L. or D. and L. *Ib.*

VENDOR AND PURCHASER.

1. It is a well settled rule of equity that a grantee, to whom possession has been delivered under covenants of title and warranty, can have no relief in this court against his grantor for a return of purchase money or security, on account of a deficiency or failure of title. *Denson v. Morris*, 37.

2. If a grantee in possession has taken no covenants and the title fails, he will be without a remedy in equity as well as at law, provided the contract were fair and no fraud. *Ib.*

3. But if fraud is shown in making the purchase or in completing it and whether there be covenants of title or not, the purchaser may come into equity for relief or to obtain indemnity against eviction, dis-

turbance or defect of title. These circumstances take the case out of the general rule. *Ib.*

4. Assignees of a bankrupt sold a lot of ground for \$4,300 to I. S. with a promise of covenants in fee and a warranty; the latter took possession and expended money in building; the assignees then refused to give a deed with full covenants or warranty and fixed him down to take a deed with a covenant against their own acts only and took a bond and mortgage for \$4,000 payable in five years, upon the understanding that if their title failed they would return the purchase money and, in the meantime, would not pass the mortgage away; the assignees, without the knowledge of I. S., were notified of an intention to contest their title; I. S. sold to R. D. who paid off the mortgage (the assignee having, against their promise, parted with it;) one J. J. brought ejectment upon a paramount title and recovered against R. D. who compromised; and R. D. failed and assigned his property to assignees, who filed a bill against the assignees in bankruptcy for repayment of the amount which R. D. had sacrificed upon the compromise. The defendants put in general demurrers: *Held*, that the assignees in bankruptcy not only took the mortgage in trust, but were to be considered as trustees of the money arising from it and that R. D. and those representing him were entitled to the benefit of it; and, consequently, that the demurrers must be overruled. *Ib.*

5. Where circumstances denote fraud in omitting to reduce a part of an agreement into writing, the whole of it is open to parol proof. The court disregards the writing and treats the whole transaction as a verbal contract. *Phyfe v. Wardell*, 47.

6. Bill filed by the lessee of premises, which he held under a church lease, against persons who had agreed in writing to purchase his lease. Complainant alleged that an implied right of renewal entered into the purchase, and that defendants were to take, subject to a burthen upon a part of the premises of a lease for a year which had been granted by the complainant. The buyers omitted to insert these things in the written agreement, but verbally recognized them; and they managed to get a renewal in their own names, through the recommendation of the complainant; but declined, inasmuch as the old term had in the mean time expired, to make good their agreement with the latter, and proceeded to eject the tenant who was to have held possession of a part for a year. Complainant prayed that the parties might pay their purchase money and perform their contract with him. A general demurrer was interposed: but overruled. *Ib.*

7. By our practice, it is not necessary for a vendor, under a covenant to convey, to make out and tender a deed on the day the purchase is to be completed. He is not bound to prepare it until the buyer is ready to demand it, and even then, the vendor is allowed a reasonable time to draw and execute the deed. And after being thus drawn and executed he is to hold it ready for delivery when required; and he is not in default until the latter request is made. Although a purchaser may prepare the deed and tender it for execution (and then only one

demand is necessary) yet still the above appears to be the settled law of the State. *Wells v. Smith*, 78.

8. Parties entering into a contract may make time the essence of it. *Ib.*

9. A short delay, indeed even a delay for a length of time fairly accounted for and so as to repel the presumption of a waiver or abandonment of the contract, will not, ordinarily, deprive a party of his right to a specific performance. But, where the vendor requires and the purchaser agrees to make time a condition of the contract and then insert the same as a distinct and substantive part of the agreement, it must be kept. *Ib.*

10. Where a vendor lets a purchaser into possession upon an understanding not to require the consideration until the buyer has a title, the latter cannot be called upon to bring the money into court. Nor can it be done where possession has been given without any stipulation made about the purchase money. *Birdsall v. Waldron*, 315.

11. If a purchaser be in possession under a prior title or the possession commenced independently of the contract of sale, and the vendor be guilty of laches in perfecting the title, he cannot compel the buyer to bring the consideration into court. *Ib.*

12. The court will not order purchase money to be paid before a title is given, unless under special circumstances, such as taking possession contrary to the intention or will of the vendor, or where the purchaser makes frivolous objections to title, or throws unreasonable obstacles in the way of completing it, or is exercising improper acts of ownership whereby the property is lessened in value. *Ib.*

13. Where a vendor is resisting performance and does not recognize a bargain, such vendor cannot compel the vendee to pay the consideration into court. *Ib.*

14. Where a person holds land in his own name, but is only a trustee, and dies, leaving a will, the rule is that the legal estate in such lands will pass by such general words as are sufficient to comprehend it in legal construction, unless, from circumstances appearing on the face of the will, it can be collected that the testator meant to devise his own property only and not property which he held as a trustee. If this should be apparent from the will, the legal title of trust property will not pass by the will, although general words are used sufficiently comprehensive to embrace the lands. The circumstances which weigh against the presumption are a charge of debts, limitations in strict settlement or any other disposition inconsistent with the idea of its being trust property and which leads to the inference that the testator could not have intended to give the legal estate of such property. The Farmers F. I. and Loan Company foreclosed a mortgage upon lands, and E. T., their president, bought the same in his own name and had it so conveyed: but, in truth, for the company. E. T. died before it could be made over to the company; and he left a will wherein he bequeathed and devised his personal property and real estate, by the description of "all my real estate," to executors upon trust for his chil,

dren (some of whom were infants.) Upon a sale of the said lands, it was held that the title and conveyance must come from the children of E. T. and did not pass to the executors under his will. The company were directed to join in a release, with warranty and the guardian *ad litem* for such of the children as were infants was required to join in and execute a conveyance on their part. *Merritt v. The Farmers' Fire L. and Loan Company*, 547.

15. A contract to sell lands is a revocation, *pro tanto*, of a prior will: but the latter remains in force as to the legal estate; the title passes to the devisee; and he will be a trustee for the purchaser and compelled to convey. *Gaines v. Winthrop*, 571.

16. Vendor decreed to perform contract, with costs. All the purchase money had not been paid. Court allowed the vendee to off-set the costs against the balance in hand. *Day v. West*, 592.

And See, *Assets*, 1; *Lien*, 1, 2, 3, 4.

VOLUNTARY DEED. VOLUNTARY SETTLEMENT.

1. If a creditor desires to impeach a voluntary settlement, upon a wife made by the husband, such creditor must be one by judgment. *Lawton v. Levy*, 197.

2. A deed perfectly gratuitous and voluntary will not, for that reason, be set aside, when free from fraud and when the party has not thought proper to reserve a power of revocation. *Powell v. Murray*, 636.

W.

WHARF.

1. A person taking out a water grant from the corporation of the city of New York for a lot of fifty feet in front on the river and binding himself to construct a wharf or bulk head along the entire front of the grant and thereupon being entitled to all the emoluments accruing from it, does not deprive himself of the right to any portion of the wharfage by dedicating a part of the lot to the public for the purposes of a street or passage. *Verplanck v. Mayor, &c. of New York*, 220.

2. The owner of upland to which wharfage or other incorporeal hereditament attaches is entitled to all such incorporeal right, so long as he retains the ownership of the soil. *Ib.*

3. A giving to the public of a perpetual right of way over the land, without an actual grant or conveyance of the land, is not a relinquishment of any of his rights incident to the fee. *Ib.*

4. The owner of a bulkhead or wharf against which a pier is placed, becomes entitled to his proportion of wharfage arising from the pier in common with the owners of the bulkhead who contribute to the building of the pier for the purpose of forming a slip or basin. *Ib.*

5. Construction of the statute in relation to wharves, piers and slips and of the powers of the corporation thereunder (2 R. L. of 1813, 431, § 224, 225, 228, 230.) *Ib.*

WILL.

1. In equity, a mere bequest by a creditor to his debtor is not necessarily or even *prima facie* a release of a debt. The court requires evidence clearly expressive of the intention. If it be neither expressed nor apparent upon the will, evidence *aliunde* may be admitted. *Stagg v. Beekman*, 89.

2. H. R., by his will, bequeathed \$1,000 to H. R. S. By a codicil, he devised a lot of ground to the same person in fee. But by an after-codicil, he revoked both the legacy and devise; and directed his executors to hold them for the sole benefit of the said H. R. S., subject to the order and direction of the court of chancery and so that his creditors should take no part of it. And if this could not be done, then the whole of the said devise and bequest were to sink into the residue. Afterwards, H. R. S. borrowed \$500 of the testator, and gave a promissory note for the amount payable in a year with interest. *Held*, that the executors were trustees for the said H. R. S. as to the rents and income of the lot and bequest; that there was no lapse as to these; and that, under the circumstances, the debt of \$500 was to be deducted and the balance only of the \$1000 considered as held in trust for him. *Ib.*

3. A devisor may give to his devisee either land or the price of land at his pleasure; and the devisee must receive it in the quality in which it is given and cannot intercept the purpose of the devisor. If it be the purpose to give land to the devisee, the land will descend to his heir, and if it be the purpose of the devisor to give the price of land to the devisee, it will, like other money, be part of his personal estate. *Marsh v. Wheeler*, 156.

4. If one of several devisees dies in the lifetime of the devisor and the heir of the devisee stands in his place, the purpose of a sale, for the convenience of a division, still remains and the share of the one dying will pass as money and not as land. But, in the event of all the devisees dying in the lifetime of the devisor, the purpose of a sale, for the sake of a division, may no longer be applicable, and the heirs will take the whole interest as land. *Ib.*

5. When distant legacies are given to individuals or an aggregate bund is directed to be divided among them in equal shares, without the benefit of survivorship, their interests are several and if any of them die before the shares are vested, what was intended for them will fall into the residue. *Ib.*

6. There are cases of a legacy lapsing where the party interested dies after the testator, provided it happen before the legacy is payable. But in order to have this effect, it must clearly appear that the time of payment is made the substance of the gift, and that the testator meant the time of payment to be the period when the legacy should vest; and if, in such case, the legatee happens to die before the time arrives, although after the testator's decease, the legacy necessarily fails. On the other hand, if the gift is immediate and the payment only is postponed to a future period (let it be of definite or uncertain duration and distinct from the gift) the legacy is vested and the death of the legatee after the testator will not defeat it. *Ib.*

7. If lands are devised or descend to the heir, charged with the payment of a pecuniary legacy to some third person, payable at a future day or upon some subsequent event, and the legatee happen to die before the time appointed for payment, the law favors the heir and considers the legacy lapsed. *Ib.*

8. The true rule with respect to the vesting of legacies payable out of real estate is this: where the gift is immediate but the payment postponed, it is contingent and will fail if the legatee dies before the time of payment arrives; but where the payment is postponed, in regard to the convenience of the person and the circumstances of the estate charged with the legacy and not on account of the age, condition or circumstances of the legatee, it will be vested and must be paid, although the legatee should die before the time of payment. *Ib.*

9. D. M., by his will, disposed of the residue of his estate as follows: "I will, order and direct all the rest, residue and remainder of my real and personal estate to be sold after the expiration of one year from the time of my decease. And I hereby authorize and empower my executors and executrix to sell and convey the said rest, residue and remainder of my real estate accordingly. And as to the said residue of my personal estate and the proceeds of the sale thereof and the proceeds of the sale of the said rest, residue and remainder of my real estate, I give, devise and bequeath the same as follows, to each of my said daughters" (*naming them*) "the sum of \$500, and the residue thereof to my sons" (*naming them*) "to be equally divided between them share and share alike. And in case either of them shall have departed this life before me, leaving lawful issue, then his portion thereof to go to such issue." One of the sons died after the testator, leaving a widow but no children. The executors had sold the real estate and the proceeds of the personalty remained in their hands. Upon a bill filed by the widow of the deceased son; it was *HELD*, that the share left to the latter was to be considered as personal estate, and that the legacy did not lapse, but would go to his widow and next of kin. *Ib.*

10. By a clause in a will "to permit my said wife to take the interest or dividends on £3,000 British Government 3 per cent. stock during her natural life:" *Held*, that she was entitled to the dividends which might be declared or become payable at any time after the testator's death. *Cogswell v. Cogswell*, 231.

11. By another clause, the executors were to invest in stock a sum of money which would produce an annual income of \$1000. And from time to time and as the same should become payable, permit his wife to take such income: *Held*, that the executors, in analogy to paying legacies, might take one year for the investment. *Ib.*

12. Where the court has to determine whether, under a will, B. and M. take estates in fee or for life with remainders and also whether their children take remainders for life or in fee (out of the same property :) it will be necessary to bring both B. and M.'s children and their representatives before the court as parties. *O'Brien v. Heeney*, 242.

13. M., by will, directed a division of his personal estate among his five children and their issue, deducting however all advancements, provided the personal estate should be sufficient, by such deductions, to make an equal division of the same; and if not, that the income and rents of the realty bequeathed to such of the children having such advancement should be retained and appropriated to the repayment of such advancement until the same was reduced to \$6,000, and that such \$6,000 or any advancement under that sum should be considered a permanent loan, bearing interest, payable from the respective share and income of the rents of the party having such advancement and the principal to be deducted from the respective share of the real estate upon a final division. The personal property, including the debts due from two of the sons, amounted to \$27,820—one of these debts was for \$6,000; and the other \$10,000 and, owing to the deficiency of the personal estate, to give each of the children \$6,000, a question arose as to the manner of dividing the personalty: *Held*, that the personalty must be equally divided amongst the five children, without reference to these advances; and that such advances must be turned over to the real estate. *Morton v. Morton*, 457.

14. C., by her will, directed her property to be converted into money and invested at interest; and, after giving legacies, ordered as follows: "that all such residue of said interest money or other profits as there shall be, after such payments as above mentioned, be equally divided among my children or the survivor or survivors of such as shall die childless yearly and every year share and share alike during their natural lives; and that if either of my said children shall die leaving a child or children, then the part or share of which the parent of such child or children was receiving the interest during his life shall immediately vest in and be the property of such his child or children as shall be living at his death:" *Held*, that this did not come within the provision of the Revised Statutes (1 R. S. 773, § 1,) providing against the suspension of ownership of personal property for a longer period than two lives; and that the clause was good. *Cromwell v. Cromwell*, 495.

15. J. P., by will, devised the residue of rents and profits of real and personal estate to his children C. B., J. I. P., D. D., W. P. and P. R. P. to be equally divided between them and their legal heirs; and in case any of his said children died without issue, his or her share should revert to the remaining children; but in case of one dying and

leaving issue, then the part which such child would have been entitled to should make a share for his or her child. There was a power to his executors to sell all the real estate, add all the personalty to it and divide the same into five parts, and dispose of one fifth to the said C. B. or her legal heirs, one fifth to the said J. I. P. or his legal heirs, one fifth to the said P. R. P. or his legal heirs, one fifth part at interest, such interest to be paid to the said D. D. and in the event of her death before her husband, to appropriate the interest to the benefit of her children as they came of age; and if she survived him, then she was to be put into the full possession of the one fifth. And the remaining one fifth was to be placed at interest for W. P. (another child;) and in case of his death leaving no issue, then this fifth was to be divided between the testator's surviving children and his legal heirs, but should he reform in his habits, then he was to have the entire possession of this fifth part. The will directed the executors to sell a house in Broad Street and out of the proceeds to pay a legacy; and the residue of the purchase money was to be divided into six equal parts, one was to be given to his wife and the remaining five sixths were to be distributed among his children and their legal heirs in the same manner as had been before directed with regard to the real and personal estate after the death of his wife. The widow survived all the children, except W. P., and then died. W. P. was living, but had never any children. C. R., D. D., J. I. P. and P. R. P. were all dead leaving children. Prior to the deaths of P. R. P. and J. I. P., they had respectively assigned their rights in the testator's estate by way of mortgage, without their widows having joined: *Held*, that the children took an estate for life in the property, and that the remainder in fee went to the children of the devisees, i. e. all the children of the devisees, and not merely those born at the time of making the will or at the death of the testator. That the lands passed by a devise of the rents and profits; and were vested in the devisees, subject to the power of sale in the trustees; and when this was executed, the proceeds belonged to the devisees for life in remainder in like manner as the land. That the proceeds of the Broadway House, after setting apart a sixth for the widow, stood upon the same footing. That as J. I. P. and P. R. P. had only a life estate, their widows had no dower; and the mortgages only operated upon their shares of the rents and profits. That W. P.'s share was to be put out during his life and afterwards divided amongst his brothers and sisters-children *per stirpes*. Shares of infants to be paid to general guardians, and where there were no general guardians, to be paid into court. The shares of *femes covert* (if of age) to be paid over on joint receipts of themselves and husbands. *Smith v. Post*, 523.

16. H. H. was one of the children and heirs of J. H. deceased. The latter, by will, devised all his real and personal estate to his executors; upon trust to convert the personalty into cash and invest the proceeds; and to lease such part of the real estate as was situated within the city of New-York, and, if deemed discreet, to sell that part of it

which was out of the city. The rents and profits (to be received by his executors) were to form one general fund. An annuity and some legacies were given out of it; and all the residue of income of this general fund was to be divided equally among the heirs who were named (among them, the above H. H.) and to be paid to them upon their own receipts. Upon the decease of either of the testator's sons before a partition, thereafter directed, leaving issue, such sons had power to appoint, by will, as to their proportions of the income; should either son die intestate leaving issue, then the same was to be paid to their respective widows for the support of themselves and their children; and if no widows survived them, then to the guardians of the children. After the expiration of twenty-one years from the date of the will and as soon as the executors should then deem it discreet, all the estate, real and personal, was to be divided, by the executors, among the testator's heirs or their legal representatives, the latter to take the share of their ancestor. In making partition, if both parents were dead and their children had attained the age of twenty-one years or were married, the share of the parent was to be partitioned amongst such children and paid over; and those who had not attained such age or were not married, their shares were to be invested and leased until such period or marriage and the dividends, &c. paid to their guardians. In making the partition, if both parents were alive and had issue, then, with regard to the personal estate forming the share of such parent (heir of the testator,) the executors were to invest the same under the direction of the parent and pay it into the hands of the latter; and the real estate, forming the share of such parent, was to be leased during his life and the rents to be paid in like manner to him—and upon the decease of both parents, the personal property was to be paid over and the real estate divided as before directed in the case of the death of both parents before partition. In making the partition, where both parents were dead leaving no issue, the share of real and personal property, which would have fallen to the parent, was then to be distributed, according to the statute of distributions, among the testator's surviving children and their legal representatives. Two of the testator's heirs were appointed executors—one of them being the *cestui que trust* H. H. *Held*, that the absolute ownership of the personal estate was unduly suspended; and it was not an answer to the objection founded upon the statute to say that the events provided for might not arise. Also, that as H. H. was, here, a trustee as well as a *cestui que trust*, the trust, as to him, could not be supported. *Craig v. Hone*, 554.

17. Even if the trusts could be considered valid, H. H. had an interest which was liable to his creditors and the same could be reached by a judgment creditor. The exception in the statute relating to creditors bills (as to funds held in trust and proceeding "from some person other than the defendant himself") has relation to trusts authorized to be created for the benefit of the unfortunate, the infirm and the helpless and where the property has been placed in the hands of a trustee for the

purpose of putting it beyond the reach of the *cestui que trust* or creditors. *Ib.*

18. A contract to sell lands is a revocation, *pro tanto*, of a prior will : but the latter remains in force as to the legal estate ; the title passes to the devisee ; and he will be a trustee for the purchaser and compelled to pay. *Gaines v. Winthrop*, 571.

And See, *Tenant for life*, 1, 2, 3, 4.



WITNESS. EVIDENCE.

1. Parol evidence is admissible to prove a trust in opposition to an absolute deed or written instrument ; but it must be evidence of so positive a character as to leave no doubt of the fact and, at the same time, so clearly define the trust that the court may see what is requisite for its due execution. *Harrison v. M'Menomy*, 251.

2. After a witness in an examiner's office has been called and examined by a party, he himself cannot withdraw him, even though he may be interested, but is compelled to let the witness be cross-examined generally in support of the rights of an opposite party. *Bogert v. Bogert*, 399.

3. So far as a counsel has got information solely from a person coming to him in the character of client, the rule of secrecy holds : but no further. *Ib.*

4. Although one defendant can move to suppress the testimony of a witness, who was a party, and for whose examination no order was entered under the rule, yet his testimony will hold against the party who had called him and it is also good as to those who have waived objections. *Ib.*

5. There is no occasion for an executor, who comes to have the trusts of a will defined, to bring testimony for the purpose of invalidating the marriage of a defendant who claims an interest in the estate through it. *Ib.*

6. Where a written document is the basis of a suit, it will be necessary to prove it, even though the principal defendant may admit the same. *Desplaces v. Goris*, 422.

7. Such was the present case ; and the complainant had closed his opening argument, when the objection was taken by the defendant's counsel, who also closed his argument. The court considered such objection valid ; but allowed the case to stand over for the purpose of giving the complainant time to move in the premises. A motion was made to be now allowed to prove the agreement ; which was granted upon payment of costs. In the meantime, the argument of the cause was suspended. *Ib.*

And see, *Adultery* 1. ; *Practice, Examination of Witness. Receipt* 1.

END OF VOLUME II.

